UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 95-88888-cgm

- x

In the Matter of:

THE BANKRUPTCY LINK,

Debtor.

- x

Adv. Case No. 08-01789-cgm

- x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC. et al.,

Defendants.

- x

Adv. Case No. 09-01239-cgm

- x

PICARD,

Plaintiff,

v.

FAIRFIELD INVESTMENT FUND LIMITED, et al.,

Defendants.

- x

Adv. Case No. 10-04921-cgm

- x

IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Plaintiff,

v.

MILLER,

Defendants.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

June 16, 2021

9:55 AM

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re 08-01789-cgm Doc# 20455 Notice of Adjournment of Hearing RE: Letter /Letter to Judge Bernstein re Remaining Chaitman LLP Adversary Proceedings Filed by Nicholas Cremona on behalf of Irving H Picard Esq.; hearing held and adjourned to 6/16/2021 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 08-01789-cgm Doc# 20456 Notice of Adjournment of Hearing RE: Letter in Response to Trustees Letter to Judge Bernstein re Remaining Chaitman LLP Adv. Pro. Listed on Exhibit A Filed by Helen Davis Chaitman on behalf of Atwood Management Profit Sharing Plan & Trust f/k/a Atwood Regency Money Purchase Pension Plan, in its own right and as a successor-in-interest to the Atwood-Regency Defined Benefit Plan & Trust, Donald A. Benjamin, Benjamin T. Heller Irrevocable Trust, Bernard Whitman Revocable Living Trust U/A/D 8/5/86, Bernard and Judith Whitman As Partners of the Whitman Partnership, Denis Castelli, Denis M. Castelli, Ronald Cohen, in his capacity as a Partner of Placon2, Carol DiFazio, Frank DiFazio, Elaine Dine, Dino Guiducci and Mary Guiducci, ind. and in capa. as Co-Ttees of Atwood Regency Profit Sharing Plan & Trust f/k/a Atwood Reg. Money Purchase P&T, and former Co-Ttees of Atwood Reg. Defined Bene. P&T, Doron Tavlin Trust U/A 2/4/91, Richard G. Eaton, Leslie Ehrlich, Stephen Ehrlich, Elaine Dine Living Trust dated

5/12/06, Estate of Allen Meisels, Estate of Boyer Palmer, Estate of Boyer Palmer, Estate of Jacob M. Dick, as grantor of the Jacob M. Dick Rev Living Trust Dtd 4/6/01, Estate of James M. Goodman, Estate of Seymour Epstein, Estate of Steven I. Harnick, Fern C. Palmer, Fern C. Palmer Revocable Trust Dtd 12/31/91, as amended, Fern C. Palmer Revocable Trust dated December 31, 1991 as amended, Fern C. Palmer and Boyer H. Palmer, Trustees of the Palmer Revocable Trust, Jennifer Gattegno, Judith Gattegno, Carla Ginsburg, Edythe Gladstein, Glenhaven Limited, Andrew M. Goodman, Audrey Goodman, Goodman Capital Partners L.P., Goodman Charitable Foundation, in its capacity as a limited partner of JABA Associates LP, Goodman Holdings, Inc., as General Partner of Goodman Capital Partners L.P., Jerome Goodman, Individually, as trustee for The Jerome Goodman Childrens GRAT #1, as Limited Partner of Goodman Capital Partners L.P., and as Beneficiary of The Jerome Goodman Children, Abbey Goodman, as Beneficiary of The Jerome Goodman Childrens GRAT #1 and as Limited Partner of Goodman Capital Partners L.P., Kevin Goodman, as Beneficiary of The Jerome Goodman Childrens GRAT #1 and as Limited Partner of Goodman Capital Partners L.P., Peter Goodman, as Beneficiary of The Jerome Goodman Childrens GRAT #1 and as Limited Partner of Goodman Capital Partners L.P., Philip Goodman, as Limited Partner of Goodman Capital Partners

L.P., Audrey Goodman, in her capacity as a general and limited partner of JABA Associates LP, Bruce Goodman, in his capacity as a general Partner of JABA Associates LP, Andrew Goodman, in his capacity as a general partner of JABA Associates LP, Guiducci Family Limited Partnership, Mary Guiducci, individually and in her capacity as a General Partner of the Guiducci Family Limited Partnership, Sandra Guiducci, individually and in her capacity as a General Partner of the Guiducci Family Limited Partnership, Dino Guiducci, individually and in his capacity as a General Partner of the Guiducci Family Limited Partnership, Gary L. Harnick, Martin R Harnick, Pamela Harnick, Harry Smith Revocable Living Trust, Toby Harwood, Benjamin T. Heller, Diane Holmers, Heidi Holmers, Irrevocable Trust FBO Ethan Siegel, in its Capacity as a member of the Kuntzman Family L.L.C., Irrevocable Trust FBO Jennifer Gattegno, in its capacity as a member of the Kuntzman Family L.L.C., JONATHAN SCHWARTZ, AS BENEFICIARY OF THE GERTRUDE E. ALPERN REVOCABLE TRUST, Jacob M. Dick Revocable Living Trust Dtd 4/6/01, Individually and as Tenant in Common, Carol Kamenstein, David Kamenstein, Peter D. Kamenstein, Sloan G. Kamenstein, Tracy D. Kamenstein, Barbara Keller, Gerald E. Keller, Eugenie Kissinger, Walter B. Kissinger, Kenneth M. Kohl, Myrna Kohl, Kenneth M. Kohl, as an individual and as a joint tenant, Myrna L. Kohl, as an

individual and as a joint tenant, Marlene Krauss, Kuntzman Family LLC, LEWIS ALPERN, IN CAP. AS SUCC. TR. OF GERTRUDE E. ALPERN REV. TRUST, AS BEN. OF GERTRUDE E. ALPERN REV. TRUST, AS EXE. OF THE ESTATE OF GERTRUDE E. ALPERN, AND IN CAP. AS TR. OF PAUL ALPERN RES. TRUST, Barbara June Lang, as personal representative, as trustee, as an individual, and as joint tenant, Laura Ann Smith Revocable Living Trust, Laura Ann Smith in her capacity as Settlor and Trustee for the Laura Ann Smith Revocable Living Trust, Felice T. Londa, in her capacity as a Partner in Train Klan, Jessica Londa, in her capacity as a Partner in Train Klan, Peter Londa, in her capacity as a Partner in Train Klan, Pamela Marxen, Allen Meisels, James M. New, Laura W. New, Russell Oasis, Philip F. Palmedo, Blake Palmer, Boyer Palmer, Boyer F. Palmer, Bret Palmer, Brett Palmer, Bruce Palmer, Bruce N. Palmer, John W. Palmer, Karen Anderson Palmer, Kurt Palmer, Oscar Palmer, Sophia Palmer, Palmer Family Trust, Palmer Family Trust and its Beneficiaries, Felice J. Perlman, Sanford S. Perlman, Placon2, Robert Plafsky, Plafsky Family LLC Retirement Plan, Robert Plafsky, in his capacity as Trustee for the Plafsky Family LLC Retirement Plan, ROBERTA SCHWARTZ, AS BEN. OF THE GERTRUDE E. ALPERN REV. TRUST, AS SETTLOR AND BEN. OF THE ROBERTA SCHWARTZ TRUST, AND IN HER CAP. AS TRUSTEE OF THE ROBERTA SCHWARTZ TRUST, Judd Robbins, Roberta Schwartz

Trust, Roberta Schwartz Trust, Joan Roman, Robert Roman, Russell Oasis, Gloria Albert Sandler, individually as grantor and beneficiary of and in her capacity as Trustee of The Gloria Albert Sandler and Maurice Sandler Revocable Trust, Maurice Sandler, individually as grantor and beneficiary of and in his capacity as Trustee of The Gloria Albert Sandler and Maurice Sandler Revocable Trust, Barbara L. Savin, Robert S. Savin, Donna Schaffer, Jeffrey Schaffer, Keith Schaffer, Roberta Schwartz, Shelburne Shirt Company, Inc., Laura Ann Smith, Laura Ann Smith, THE ESTATE OF GERTRUDE E. ALPERN, Doron A. Tavlin, as Trustee and Beneficiary of the Doron Tavlin Trust U/A 2/4/91, Doron Tavlin, in his capacity as Trustee of the Trust for the Benefit of Ryan Tavlin, Ryan Tavlin, individually as beneficiary of the Trust for the Benefit of Ryan Tavlin, The Gerald and Barbara Keller Family Trust, The Gloria Albert Sandler and Maurice Sandler Revocable Living Trust, The Harnick Brothers Partnership, Train Klan, a Partnership, Trust Under Agreement Dated 12/6/99 for the benefit of Walter and Eugenie Kissinger, Trust dated 2/4/91 F/B/O Doron A. Tavlin, Harvey Krauss and Doron A. Tavlin Trustees, Bernard Whitman, Judith Whitman, Robert S. Whitman, Zieses Investment Partnership; hearing held and adjourned to 6/16/2021 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 10-04921-cgm Doc# 92 Motion for Summary Judgment /Notice of Motion for Summary Judgment filed by Nicholas Cremona on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

HEARING re 10-04921-cgm Doc# 104 Motion for Summary Judgment /Notice of Defendant's Cross- Motion for Summary Judgment filed by Arthur H. Ruegger on behalf of Stanley T. Miller. Responses due by 5/26/2021

HEARING re 10-04921-cgm Doc# 107 Objection /Defendant's Objections, Responses and Counterstatements in Opposition to the Trustee's Statement of Material Facts Pursuant to Fed.R.Civ.P.56, Fed.R.Bankr. 7056 and Local Rule 7056-1 (related document(s)100) filed by Arthur H. Ruegger on behalf of Stanley T. Miller.

HEARING re 10-04921-cgm Doc # 105 Memorandum of Law /Defendant's Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Trustee's Motion for Summary Judgment (related document(s)104) filed by Arthur H. Ruegger on behalf of Stanley T. Miller. Objections due by 5/26/2021,

HEARING re 10-04921-cgm Doc# 112 Memorandum of Law /Defendant's Reply Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Trustee's Motion for Summary Judgment and the Memorandum of Law Filed by the Securities Investor Protection Corporation (related document(s)104, 92, 110) filed by Arthur H. Ruegger on behalf of Stanley T. Miller

HEARING re 10-04921-cgm Doc# 110 Memorandum of Law in Support of the Trustee's Motion for Summary Judgment and in Support of the Trustee's Opposition to Defendant's Cross-Motion for Summary Judgment (related document(s)108) filed by Kenneth Caputo on behalf of Securities Investor Protection Corp..

HEARING re 10-04921-cgm Doc# 109 Statement /Trustees Reply to Defendants Objections, Responses, and Counterstatement of Material Facts filed by Nicholas Cremona on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

HEARING re 10-04921-cgm Doc# 108 Memorandum of Law /Trustees Reply Memorandum of Law in Further Support of Trustees Motion for Summary Judgment and Opposition to Defendants Cross-Motion for Summary Judgment filed by Nicholas Cremona

on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

HEARING re 09-01239-cgm Doc# 305 Motion to Dismiss Adversary Proceeding (Second Amended Complaint) (related document(s)286) filed by Peter E. Kazanoff on behalf of FAIRFIELD GREENWICH CAPITAL PARTNERS, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich Limited, Fairfield International Managers, Inc., Fairfield Investment Fund Limited, Walter Noel, Andres Piedrahita, Corina Noel Piedrahita, SHARE MANAGEMENT LLC, Stable Fund, Philip Toub, Jeffrey Tucker, Amit Vijayvergiya.

HEARING re 09-01239-cgm Pre Trial Conference

HEARING re 09-01239-cgm Doc# 311 Opposition Brief /Trustees Memorandum Of Law In Opposition To Defendants Motion To Dismiss The Second Amended Complaint (related document(s)305) filed by David J. Sheehan on behalf of Irving H. Picard.

HEARING re 09-01239-cgm Doc# 313 Reply to Motion to Dismiss the Second Amended Complaint (related document(s)305) filed by Peter E. Kazanoff on behalf of FAIRFIELD GREENWICH CAPITAL PARTNERS, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich Limited, Fairfield International Managers, Inc., Fairfield Investment Fund Limited, Walter Noel, Andres Piedrahita, Corina Noel Piedrahita, SHARE MANAGEMENT LLC, Stable Fund, Philip Toub, Jeffrey Tucker, Amit Vijayvergiya.

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

BAKER HOSTETLER LLP
Attorneys for the Trustee, Irving Picard
45 Rockefeller Plaza
New York, NY 10111

BY: NICHOLAS CREMONA
CAMILLE BENT
ERIKA THOMAS

SIMPSON THACHER & BARTLETT LLP
Attorneys for Barreneche, Inc. et al.
425 Lexington Ave
New York, NY, 10017

BY: MARK G. CUNHA
SARAH EICHENBERGER

WOLLMUTH MAHER & DEUTSCH LLP

Attorneys for Fairfield Investment Fund Limited, Defendant

500 Fifth Avenue

New York NY 10110

BY: FLETCHER STRONG

ALSO PRESENT TELEPHONICALLY:

ANDREW B. KRATENSTEIN

KELLY A. LIBRERA

SCOTT BERMAN

MICHAEL ROBERT CARNEY

BERNARD V. KLEINMAN

DARA GILWIT HAMMERMAN

JONATHAN L. FLAXER

AMIAD KUSHNER

JONATHAN R. BARR

XOCHITL S. STROHBEHN

DAVID J. KANFER

IRA A. REID

JUSTIN D. MAYER

GREGG MASHBERG

ROBIN SPIGEL

DANIEL M. GLOSBAND
ERIC D. GOLDBERG
SCHUYLER D. GELLER
ARTHUR H. RUEGGER
ROBERT ALAN ABRAMS
JEFFREY T. SCOTT
MARC D. POWERS
VALERIE SIROTA
LARRY IVAN GLICK
BERNARD J. GARBUTT
DAVID J. SHEEHAN
DOROTHY HEYL
HELEN V. CANTWELL
KENT A. YALOWITZ
PETER D. MORGENSTERN
KEVIN H. BELL
JAMES ADDISON WRIGHT
MARC G. ROSENBERG
CHESTER B. SALOMON
INA BORT
LINDSAY WEBER
MARGARITA Y. GINZBURG
FRANKLIN SANDS
ROBERT S LOIGMAN
CATHERINE WOLTERING

ROBERT S. GOODMAN
THOMAS D. GOLDBERG
DAVID FASTENBERG ET AL.
DANIEL STUART ALTER
ROBERT J. NELSON
ERIC B. LEVINE
BIK CHEEMA
EVA PASCALE BIBI
RICHARD J. BERNARD
BETH-ANN ROTH
EUGENE F. GETTY
ROBERT S FISCHLER
JOHN MOSCOW
MELANIE L. CYGANOWSKI
GEORGE M. CHALOS
HOWARD KLEINHENDLER
BRIAN W. HARVEY
KIRK L. BRETT
THOMAS EDWARD LYNCH
GREGORY W. FOX
SHANNON R. SELDEN
LINDA H. MARTIN
DAVID W PARHAM
TAMMY P. BIEBER
BRIAN J. BUTLER

LAURA K CLINTON
RICHARD A. KIRBY
KAREN E. WAGNER
ELLIOT MOSKOWITZ
VLADIMIR PAVLOVIC
MENACHEM O. ZELMANOVITZ
ROBERT H. AVAUNT
CARL H. LOEWENSON
HOWARD L. SIMON
JEFFREY E. BALDWIN
ELLIOT G SAGOR
GENE M. LINKMEYER
ROBERT A. WALLNER
ALAN E. GAMZA
RICHARD A. CIRILLO
TIMOTHY WEDEEN
MARGUERITE M. GOREK
JONATHAN T. KOEVARY
GREGORY S KINOIAN
PHILIPPE MARC SALOMON
TODD J. ROSEN
CHRISTOPHER H. LAROSA
RONALD L. ISRAEL
RICHARD CORBI
MICHAEL M. KRAUSS

BRAD ROGERS
ANDREA FISCHER
LAWRENCE J. KOTLER
PHILIP J DICHTER
ADAM L. ROSEN
CHRISTOPHER L. GALLINARI
VIVIAN R. DROHAN
MAX FOLKENFLIK
BRIAN DUNEFSKY
STEPHEN JOHN AKERS
MELISSA KOSACK
STEVEN B. MENDELOW
DENNIS J. NOLAN
RICHARD SCHWED
THOMAS J. SCHELL
DON ABRAHAM
ALAN UNGER
STACEY ANN BELL
JUDITH A. ARCHER
EUNICE RIM HUDSON
JENNIFER B ZOURIGUI
DAVID L. BARRACK
JOHN D. O'NEILL
HEATHER LAMBERG
ONA T. WANG

LAUREN RESNICK
LARY S. WOLF
GREGORY F. HAUSER
LAUREN C. WATSON
REX LEE
SHAWN M. CHRISTIANSON
THOMAS D. GOLDBERG
MICHAEL S. POLLOK
NATHANAEL KELLEY
MATTHEW M. GRAHAM
ERIN E VALENTINE
MICHELLE L. GREENBERG
RICHARD G. HADDAD
MICHAEL KWON
ANNA CONLON AGUILAR
BRETT S. MOORE
WILLIAM R. FRIED
SECURITIES AND EXCHANGE COMMISSION
AARON FONG JAROFF
CARMINE BOCCUZZI
MEGAN P. DAVIS
SEANNA BROWN
DAVID M. GARELIK
MATTHEW B. LUNN
HELEN DAVIS CHAITMAN

RICHARD E. SIGNORELLI
CHRISTOPHER R. FENTON
GARY STEIN
JASON A NAGI
ANTHONY L. PACCIONE
BRIAN K. ESSER
LEE HARRINGTON
BARTON NACHAMIE (+)
MICROSOFT CORPORATION AND MICROSOFT LICENSING, GP
MARK MCDERMOTT
ALEC P. OSTROW
NATHAN D. ADLER
PETER GREGORY SCHWED
ERIC MARK KAY
ANTHONY D. BOCCANFUSO
PHILIP R. SCHATZ
STEVEN B. EICHEL
DEBORAH A. REPEROWITZ
JOSHUA COLANGELO-BRYAN
JOSEPH P. MOODHE
RICHARD M. METH
JULIE GORCHKOVA
JONATHAN ETRA
RENEE ROBINOW SOSKIN
GEORGE BRUNELLE

ESTERINA GIULIANI
WILLIAM P. WEINTRAUB
JOHN JOSEPH KUSTER
JESSICA DEBORAH MIKHAILEVICH
CASEY D. LAFFEY
MATTHEW A KUPILLAS
THOMAS L. LONG
MARTIN J. AUERBACH
FRED W. REINKE
MICHAEL T. DRISCOLL
LEIF T. SIMONSON
MARK J. HYLAND
ELIZABETH ROZON
BRUCE S. SCHAEFFER
SUSAN CAPOTE
DAVID J. MARK
DAVID C. MCGRAIL
GINNY L. GOLDMAN
JORDAN HARAP
GREGORY GOETT
DAVID M. BANKER
CHRISTIAN DE PREUX
GABRIELLE J. PRETTO
SARA RICCIARDI
ANGELINA E. LIM

ANDREA J ROBINSON
BRUCE M GINSBERG
PHILIP BENTLEY
EDWARD SMITH
PATI H. GERBER
PATTI H. GERBER 1997 TRUST
LEONARD A. RODES
WAYNE A. SILVER
TERENCE WILLIAM MCCORMICK
EARL COLSON
PETER W. SMITH
SCOTT CAPLAN
MICHAEL S. FELDBERG
GREGORY M DEXTER
ALISSA M. NANN
BRYAN HA
SANFORD PHILIP ROSEN
BRIAN H. GERBER
OREN WARSHAVSKY
ELAINE ROSENBERG
DANIEL M. KUMMER
JOSEPH E. SHICKICH
JONATHAN KORTMANSKY
REGINA GRIFFIN
JOSEPH M KAY

PAMELA MILLER
BRIAN H. POLOVOY
JAMI MILLS VIBBERT
ERIC R FISH
ANDREW JOHN FINN
MARIEL R. BRONEN
GERARD SYLVESTER CATALANELLO
VIRGINIA I. WEBER
DAVID L. MITCHELL
KEITH R. MURPHY
BRENDAN M. SCOTT
EDWARD P. GROSZ
RONALD SCOTT BEACHER
TIMOTHY P. HARKNESS
JACOB BUCHDAHL
CHRISTOPHER GRESH
CHRISTOPHER M. DESIDERIO
MICHAEL WEXELBAUM
STUART I. RICH
JEFFREY L. ROETHER
ROBERT A. RICH
AMY VANDERWAL
PFA PENSION A/S
LUCILLE B. BRENNAN
JOHN F. SAVARESE

GARY S. LEE
SUSAN F. BALASCHAK
THOMAS G. WALLRICH
TRACY L. KLESTADT
JACLYN M. METZINGER
TORELLO H. CALVANI
DAVID A. ROSENZWEIG
RICHARD B. LEVIN
BREON PEACE
JOSHUA FOWES
ELYSSA SUZANNE KATES
RICHARD J. MCCORD
ERIC L. LEWIS
JOHN J COLLINS
JEFFREY J RESETARITS
SANFORD P. DUMAIN
NEIL A. STEINER
DICHTER-MAD FAMILY PARTNERS, LLP
GAYTRI D. KACHROO
GERARDO GOMEZ GALVIS
YANN GERON
PENSION BENEFIT GUARANTY CORP.
JENNIFER L. YOUNG
J. MICHAEL MURRAY
RICHARD BAILEY

JESSICA SIMONOFF
GEORGE W. SHUSTER
SEONG H. KIM
ALEX R. ROVIRA
CHARLES COLLIER PLATT
CHRYSSA VILMA BETH VALLETTA
PETER E. SHAPIRO
MARISA GLASSMAN
MICHAEL E. PETRELLA
DAVID Y. LIVSHIZ
JOSHUA E. KELLER
RUSSELL M. YANKWITT
ELIZABETH A. SCULLY
MADELINE CELIA CHAIS 1992 TRUST
KEITH N COSTA
DAVID FARRINGTON YATES
JONATHAN M. LANDERS
DOUGLAS L FURTH
ERNEST EDWARD BADWAY
JOHN J. BURKE
JONATHAN K. COOPERMAN
BRIAN MADDOX
PAUL S. HUGEL
DAVID S. GOLUB
DOUGLAS A. KELLNER

WILLIAM L. CHAPMAN
RAYMOND V VASVARI
FREDERICK E. SCHMIDT
CAROLE NEVILLE
MICHAEL IRA GOLDBERG
MICHAEL ZEB LANDSMAN
CARL F. SCHOEPPL
FRED H. PERKINS
GARY F. EISENBERG
DOUGLAS WOLFE
NOWELL BAMBERGER
DAVID A. KOTLER
ROBERT MILLER
JOHN OLESKE
JAMES SERRITELLA
SCOTT S BALBER
LAWRENCE M. SHAPIRO
ROBERT J. KAPLAN
PAUL RUBIN
KEITH COSTA
MICHAEL J. RIELA
WILLIAM B. POLLARD
ANDREW J. EHRLICH
GEORGE V. UTLIK
TED A. BERKOWITZ

STEPHANIE WICKOUSKI
THOMAS A TELESCA
WILLIAM A. HABIB
JESSIE MORGAN GABRIEL
BETH-ANN ROTH
MARK S. ROHER
BRUCE BUECHLER
DEBBIE LYNN LINDENBAUM
MARK I SILBERBLATT
DAVID S. STONE
SHANNON ANNE SCOTT
MICHAEL J. RIELA
MARK S. LICHTENSTEIN
KIMBER P. SCHLADWEILER
PAUL T. WEINSTEIN
MARSHA TORN
DONG NI XU
JENNIFER A. CLARK
RALPH A. SICILIANO
MICHAEL P. BURKE
MARSHALL R. KING
LAWRENCE B. FRIEDMAN
ERIC FISHMAN
EUGENE ERNEST STEARNS
STEPHEN A. WEISS

JORDAN W. SIEV
MARK MULHOLLAND
RICHARD L. BRITTAIN
FREDERICK R. KESSLER
BENJAMIN J.O. LEWIS
EMILY J. MATHIEU
BARBARA A. SCHWEIGER
STEVEN FROOT
JAMES J. VINCEQUERRA
WINDELS MARX LANE & MITTENDORF, LLP
ANDREW J. GOODMAN
MARVIN C. INGBER
NORMAN N KINEL
IRVING H. PICARD
ELIZABETH A. MOLINO
LIQUIDITY SOLUTIONS, INC.
PETER E. KAZANOFF
BRAD N. FRIEDMAN
GREGORY ZIMMER
KATHLEYA CHOTIROS
JOEL L. HERZ
HUNTER T. CARTER
CHRISTOPHER MATTHEW GUHIN
FRANK MCGINN
ANDREW T. SOLOMON

THOMAS B. HATCH
ROBINSON B. LACY
NICHOLAS S. DAVIS
JAMES L. BERNARD
JEFF E. BUTLER
KIERSTEN A. FLETCHER
MAXWELL DILLAN
KAREN DAVIS
ROBERT J. LACK
EDITH A. SCHUR
THOMAS J. GIBLIN
ABIGAIL COSTER
MOR WETZLER
WILLIAM HEUER
DIANE L. MCGIMSEY
JENNIFER OPHEIM
ERIC FISHER
JACK G. STERN
GUTMACHER ENTERPRISES, L.P.
LINDSAY A. BUSH
JAMES VINCENT MASELLA
COLUMBIA UNIVERSITY
STEPHEN P. SAFRANSKI
NORMAN A. KAPLAN
CARLOS J CANINO

IMTIAZ A. SIDDIQUI
DOUGLAS E. SPELFOGEL
WILLIAM J. SUSHON
AMANDA RABOY
STEVEN R. SCHLESINGER
KATHLEEN M. AIELLO
MICHAEL D. SIROTA
ROBERT M MCCLAY
JAMES B. KOCH
STEVEN G. STORCH
ORTHOPAEDIC SPECIALTY GROUP P.C. PLAN PARTICIPANTS
IRVING J. PINTO
JOE R. WHATLEY
DANIEL B. BESIKOF
STEPHEN FISHBEIN
MARC E. HIRSCHFIELD
PRICE O. GIELEN
JOHN F. ZULACK
MARK MICHAEL ELLIOTT
JOSH KRAKOWSKY
MICHAEL DAVID KATZ
KENNETH W. LIPMAN
DAVID ONORATO
JEFFREY A. ROSENTHAL
TED A. BERKOWITZ

WILLIAM T. RUSSELL
NICOLE STEFANELLI
BRIAN NEVILLE
ARI MACKINNON
SCOTT WALTER REYNOLDS
RICHARD LEVY
DANIEL SCHIMMEL
SUSAN POWER-JOHNSTON
BARRY M. KAZAN
JESSICA L MARGOLIS
JONATHAN D. COGAN
LEE J. MONDSHEIN
SCOTT I. DAVIDSON
MARY GRACE WHITE METCALFE
THOMAS J. MOLONEY
ALAN NISSELSON
JENNIFER M. WALRATH
JASCHA D. PREUSS
ASM CAPITAL, L.P.
BRIAN J. LACLAIR
NICHOLAS G. HALLENBECK
JOSEPHINE WANG
RICHARD C. YESKOO
ANDREAS A. FRISCHKNECHT
SCHUYLER D. GELLER

SHAYA M. BERGER
JENNY LYNN FOUNTAIN
LARKIN M. MORTON
JEFFREY D. FELDER
MARK NELSON PARRY
KAREN OSTAD
GARY A. WOODFIELD
JOAQUIN M. C DE BACA
ROBERT WILLIAM YALEN
TODD E. DUFFY
LALIT K JAIN
ALLISON M. WUERTZ
FRANKLIN B. VELIE
CHAYA F. WEINBERG-BRODT
JAN DOUGLAS ATLAS
DANIEL H. TABAK
LAWRENCE TORN
KARL GEERCKEN
KENNETH CAPUTO
DAVID ELBAUM
JAMES L. GARRITY
JONATHAN M. CERRITO
JANICE BETH GRUBIN
SARAH DOWD
PHILIP J. GORDON

PAUL R. DEFILIPPO
DAVID J. EISEMAN
CHRISTOPHER HARRIS
DEBORAH A. REPEROWITZ
THOMAS S. KESSLER
RAFAEL MAYER
M. WILLIAM MUNNO
BRIAN A. SCHMIDT
BENNETTE D. KRAMER
MARTIN A. MOONEY
PATRICK SIBLEY
BENJAMIN P. DEUTSCH
BRYAN R. KAPLAN
PETER N. WANG
DAVID YEGER
ELISE S. FREJKA
BLANKA K. WOLFE
JOHN SIEGAL
ERIN MARIE MEYER
SHELDON EISENBERGER
DAVID Z SCHWARTZ
WILLIAM A MAHER
DANIEL J. KORNSTEIN
EVAN A. DAVIS
JOSEPH CIOFFI

RICHARD W. TROTTER
GARY S REDISH
MICHELE L. PAHMER
MEREDITH L. TURNER
AMY C. GROSS
GARY J. MENNITT
VERITABLE LP
MARSHALL W. KRAUSE
THOMAS E. BRETT
EDWARD JOHN JACOBS
SUSAN SALTZ DESCENDANTS TRUST
DENNIS C. QUINN
JOSEPH LUBERTAZZI
GEORGE R. HIRSCH
THOMAS F BERNDT
DEBORAH H. RENNER
THOMAS P. BATTISTONI
EDWARD SPIRO
THERESA TRZASKOMA
JEFFREY L. BERNFELD
PARVIN K. AMINOLROAYA
RANDY LEWIS MARTIN
DAVID J. SHEEHAN
NANCY LYNNE KOURLAND
PAULA J. WARMUTH

MEYER MUSCHEL
HOWARD L. VICKERY
BARRY R. LAX
JOSHUA S. ANDROPHY
STEVEN H. NEWMAN
PATRICIA H. HEER
MARK G CUNHA
KEVIN TOOLE
MICHAEL R. DAL LAGO
JEREMY A. MELLITZ
DAVID NOAH GREENWALD
JEFFREY G. TOUGAS
LAWRENCE R. VELVEL
GERALDINE E. PONTO
SAMEER NITANAND ADVANI
JIL MAZER-MARINO
ERICA KLIPPER
NEAL S. MANN
MATTHEW GLUCK
RONALD A. HEWITT
JUDITH L. SPANIER
MARC J. KURZMAN
JORIAN L. ROSE
CANDACE NEWLOVE
NICHOLAS F. KAJON

DEBORAH KOVSKY-APAP

LAURENCE MAY

SHIRLEY SCHUSTACK CONRAD

MARC J. GOTTRIDGE

WRENN CHAIS

MATTHEW J. GOLD

P R O C E E D I N G S

THE COURT: I'm calling you from my home office and bells and whistles just went off, so I have no idea what's going on. So, I may have to see what's happening. But it sounds like it's quieted down.

We will take one matter at a time and we will -- and do your appearances on that matter as we call it. We won't take matters in general. So, we'll just do it that way. The first matter we have on is an update on the 08-01789, SIPA v. BLMIS, and it is concerning the mediations. State your name and affiliation.

MR. CREMONA: Good morning, Your Honor. Nicholas Cremona of Baker and Hostetler, appearing on behalf of the Trustee, Irving Picard. As Your Honor noted, the first matter on the calendar is the status conference on the mediations in adversary proceedings with Defendants represented by Chaitman, LLP.

As you may recall, Your Honor, the parties first appeared before the Court in May of last year to request assistance in resolving approximately 60 adversary proceedings remaining where Chaitman, LLP served as counsel of record by way of mediation. At that time, the parties reached agreement on protocols to conduct mediations in those remaining cases consistent with the litigation procedures order, which is located at ECF3141. The parties

agreed to prioritize the cases and proceed to mediation before Judge Hurkin-Torres. And the Court so ordered the May 28, 2020 hearing transcript to reflect the agreed upon protocols and procedures, and the parties began mediating those cases as of June of last year.

I'm pleased to report today that overall this process has been very successful. For the most part over the past year the parties have been able to adhere to their commitment to mediate the cases on a weekly basis. During this process, the parties have consensually resolved 37 adversary proceedings.

I'm also pleased to report that the parties, from the Trustee's perspective, have completed this process and it has reached its end. The parties have fulfilled their obligation to mediate these cases. We completed mediation in all eligible cases with the exception of those cases pending in the District Court, and there are three cases where there are pending motions to withdraw the reference, and there's another case that has a pending summary judgment motion before Judge Broderick. And the only other cases where we have not mediated are cases where the Trustee has already obtained the judgment in the case, one of which was entered by Your Honor.

Mediation in all other cases, with one exception which I will discuss, has been completed either by a

successful settlement, a final report from the mediator, or based on the expiration of more than 120 days from the day the case was referred to mediation. On that last point, I would refer Your Honor to the mediation procedures that are set forth in the litigation procedures order that I mentioned, which was also discussed in the Trustee's status report filed with the Court in March.

In particular, Section 5F of the avoidance actions procedure set forth in Exhibit A to that order provides that all mediations must be completed within 100 days from the date of the mediator selection, absent mutual consent among the parties and the mediator to extend that time.

So, as I mentioned, with the exception of one case, all the remaining cases fit into one of those three categories such that our obligation to mediate has been completed. The only remaining case that is subject to an active mediation is the Keller case, which is Adversary Proceeding Number 10-04539. That is subject to ongoing settlement negotiations. And the 120-day deadline to complete mediation in that case is set to expire on June 25th. And I would submit that the parties can determine on that point whether to extend the mediation or let it conclude.

So, with that, I submit that the parties' obligations to mediate these cases has been fully completed,

consistent with Your Honor's authorization at the March 17 omnibus hearing. The Trustee intends to bring the remaining cases before this Court to a close by way of summary judgment motions in a timely manner. In that regard, as Your Honor may have noticed, the Trustee filed two such motions last week in cases where mediations have been concluded, and they are returnable on the July 28 omnibus hearing date.

With that, unless Your Honor has any questions, that concludes the Trustee's status report on these matters.

THE COURT: Okay, just give me a thumbnail right now. We've got two summary judgments pending. How many more do you think you'll be filing? Just so I know what my whole -- my whole workload is.

MR. CREMONA: Sure, Your Honor. So, as I mentioned, 37 of the 57 cases were resolved, and then there are --

THE COURT: And in this -- and what's in this Court? Not in District. Okay.

MR. CREMONA: I would say there are another 8-10 motions that we would bring. There are, as I mentioned, four matters that are before the District Court. And provided it's acceptable to Your Honor, we would bring them in the same fashion -- you know, a few motions per month, if that's acceptable and amenable to the Court's schedule.

THE COURT: That works well for me. Does anyone else wish to be heard on the status of the mediation and what's going on with the protocols or anything dealing with that? Excellent. Thank you very much. Thank you for your hard work. Thank you for the hard work of all the attorneys and the parties in this mediation process, and thank you to the mediator. I appreciate the hard work and I appreciate what you all have done.

MR. CREMONA: Thank you.

THE COURT: I -- I always feel like you can always call the mediator back. That's my sort of feeling. If you think that would be helpful, you just reach out and make it happen.

MR. CREMONA: I agree, Your Honor. And to the extent -- settlement -- we are always willing to entertain settlement and we'll continue to do so.

THE COURT: Excellent. Thank you much. And thank everyone involved very much.

MR. CREMONA: Will do. Thank you, Your Honor.

THE COURT: Very good. The next thing on the agenda and on the calendar is 08-01789, the Securities Investor Protection v. the Bernie Madoff -- which one do we have on this one? I have so many that sit out here. I believe this is the 0901239, the Securities Investor Protection and Fairfield Investment Fund LTD, Stable Fund,

Fairfield Greenwich LTD, Fairfield Greenwich Bermuda LTD, Fairfield Greenwich Advisors, LLC, Fairfield International Managers, Inc., Walter Noel, Jeffrey Tucker, Andres Piedrahita, Amit Vijayvergiya, Philip Toub, Corina Noel Piedrahita, Fairfield Greenwich Partners -- Capital Partners, and Share Management, LLC.

State your name and affiliation.

MS. THOMAS: Good morning, Your Honor. Erika Thomas of Baker Hostetler for Plaintiff, SIPA Trustee, Mr. Irving Piccard. My colleague, Ms. Camille Bent is here with me today as well.

We're here this morning, Your Honor, on the Defendant's motion --

THE COURT: Excuse me. Let the others put their name on the record, please --

MS. THOMAS: Yes, Your Honor.

THE COURT: -- so we have the record complete. Thank you. Defendants? Attorneys?

WOMAN 1: (indiscernible)

THE COURT: Okay.

MR. STRONG: Good morning, Your Honor. Fletcher Strong from Wollmuth Maher & Deutsch, LLP for Defendants Fairfield Investment Fund LTD, and Stable Fund, LLP.

THE COURT: Very good.

MR. STEINER: Good morning, Your Honor. Neil

Steiner from Decker for Defendant Andres Piedrahita.

THE COURT: Very good. We're having an audio issue I see. Okay, we will give you a moment to see if that can't be corrected. Can someone identify him so I can call him by name? Audio is off, Ms. Thomas. Ms. Thomas, your audio's off. There we go. Somebody's got it. Yes, sir? Mr. Stein? Mr. Steiner? No, Mr. Zulack?

MR. ZULACK: Yeah, I think it's lawyers from Simpson Thacher, Mark Cunha and Sarah -- I think it's Eisenberg. And Mr. -- the person who argued before you on February 10th, Peter Kazanoff's father is having a lung transplant today so he is not going to be arguing.

THE COURT: Oh, okay.

MR. ZULACK: But he has sent a message to us yesterday that his colleagues would be arguing on his behalf.

THE COURT: Very good. Give my regards to him and his father. It seems to me 2020 was horrible with COVID, and then 2021 is horrible with all other matters. I can't tell you how many times I've gotten to where I don't even want to pick up the phone. It's a family member somewhere somehow, a friend somewhere somehow. It's just been ongoing, so...

MR. ZULACK: Let me get the precise names from an email we got yesterday.

THE COURT: Thank you, thank you.

MR. CUNHA: It's Mark Cunha, C-U-N-H-A, and Sarah Eichenberger.

MR. ZULACK: Right.

THE COURT: C-U-N --

MR. CUNHA: H-A.

THE COURT: H-A. Mr. Cunha, can you hear us?

MR. CUNHA: Judge, I can hear you.

THE COURT: Okay, excellent. We can hear you on the phone. Okay, one thing you must do, though -- you must turn off the sound on your computer if you're going to use the phone.

MR. CUNHA: Hi, we were muted on your Zoom call. We could not unmute ourselves. I don't know if your court reporter can fix that for us?

THE COURT: We'll see if we can. It sounded as if -- we think the sound was turned off, not just mute. I mean, not -- yeah. So --

MR. CUNHA: Our room was unmuted but we were getting the message from Zoom that we were muted. So, on the Zoom side.

THE COURT: Okay, we'll see what we can do.

MR. CUNHA: Okay, in the meantime, we're on speakerphone for now.

MAN 1: We've also been kicked out of the meeting

now.

MR. CUNHA: Because of that feedback. Because of that feedback issue that we're having.

THE COURT: Right, right.

MR. CUNHA: I can do it, just give me a moment. I could put the call back up but give me a moment and we'll be --

THE COURT: Certainly, certainly. We all understand. We've all been there. In the -- in the -- you can also do -- did you do asterisk-six, star-six on your zoom call?

MR. CUNHA: Star-six on the Zoom call, yes.

THE COURT: Right.

MR. CUNHA: Hold on for a second.

THE COURT: I see you have experts there. They're better than I am at this kind of thing. What a gorgeous day and we're all inside. But it's better we work out everything. Mr. "Cooka," can you now speak?

MR. CUNHA: Judge, I'm told we're still muted on your Zoom.

THE COURT: Did you do asterisk-six on the computer?

MAN 1: Asterisk-six on the computer.

MR. CUNHA: I can't because we're not on the computer. It's a videoconferencing system, so we don't have

the same controls that you do from your laptop.

THE COURT: Obviously, we don't either.

MR. CUNHA: Yeah. So, Judge --

THE COURT: So we cannot unmute you. So, whatever you've put yourself on, we don't have any control over it either. All right, just stay on the phone then.

MR. CUNHA: Judge, why don't we just proceed on the phone?

THE COURT: What are you going to do about the echo? You've got an echo. Mr. "Cooka?"

MR. CUNHA: Yeah. Is there still an echo (still an echo)? Is there an echo now, Your Honor?

THE COURT: It's better. It's much better.

MR. CUNHA: Can you hear me okay?

THE COURT: We can hear you perfectly.

MR. CUNHA: All right, so --

THE COURT: Just state your name for the record, right.

MR. CUNHA: Your Honor, I'm Mark Cunha. I'm counsel for Fairfield Greenwich Advisors. And I'm arguing on behalf of all the Defendants for their request, as was already explained to --

THE COURT: I'm sorry, someone is making noise on your end and we can hear it. And it fades you out.

MR. CUNHA: Okay. Yeah. So, as I said, I'm

counsel for Fairfield Greenwich Advisors. I'll be doing the main argument for Defendants today. As has already been explained, unfortunately, Mr. Kazanoff's dad has a very serious health issue. He'll be back. He is lead counsel.

I did want to tell Your Honor that I do have involvement in the case. I was lead counsel for many years in this case as well as in the signed claims case, and in the Anwar case. I, unfortunately, a few years ago, reached a mandatory retirement age with my firm and Pete, who's been working with me on the case for many years, stepped in as lead counsel. But I have stayed involved in the case. As I said, I have very deep involvement in the case. I am still registered as a member of the Bar, Your Honor --

THE COURT: Okay. Very good. Now, Ms. Thomas, it's over to you. Thank you.

MR. CUNHA: I should also point out, Your Honor, I'm sorry -- that Sarah Eichenberger is with me from Simpson Thacher, and she'll be doing part of the argument. I'll be arguing the subsequent transfer counts 1-14; she'll be arguing counts 15-17 having to do with general partner liability, and also the requirements that claims be pled with particularity against each individual Defendant. So, Sarah's here with me.

THE COURT: Very good. Very good. Ms. Thomas?

MS. THOMAS: Thank you, Your Honor. We're here

this morning on the Defendant's motion to dismiss, the second amended complaint. Your Honor may recall the factual context of this compliant. It's not new to the Court. The allegations here are substantially the same as in Picard v. Fairfield Greenwich Group. That's 10-03800 -- the motion to dismiss, which Your Honor decided back in March involving breach of contract and other common law claims.

The majority of the claims, as Mr. Cunha stated, in this complaint before the Court today seek to recover fraudulent transfers under the Bankruptcy Code, and there are also three general partner liability claims. The Defendants here are also substantially the same as the Defendants in the other action. Here the FGG partnership is not named as a Defendant. And four additional FGG entities are named as Defendants. That's Fairfield International Fund, LTD, Stable Fund, Fairfield Greenwich Capital Partners and Share Management.

The allegations, not the individual Defendants and their partners controlled all of the FGG entities and misled investors and others in order to shield BLMIS from inquiry and profit from the Madoff fraud also remain the same.

Since it's the Defendant's motion, Your Honor, would you like them to start? I assume we will go count by count?

THE COURT: You just gave me a background. It is

their motion. It sets me up. Now then, Mr. Cunha, are you set up now to -- it's your motion.

MR. CUNHA: Thank you, Your Honor. I'll --

THE COURT: Let me just say a couple of things before you begin, for everyone on the call. This is a motion to dismiss, it's not a summary judgment motion. So, I expect to stay within the parameters of what a summary judgment is.

The other thing is try to absolutely limit what you've pled in your papers. I want you to do additions to, not resay what you've already said. Very good. It's yours.

MR. CUNHA: Okay, thank you, Your Honor. Let me just start with the point that counsel for the Trustee just cave that this is the same as the Anwar case and the same as the assigned claims case, in which Your Honor heard a motion to dismiss earlier this year. They're not. Certainly not for purposes of this motion. The Anwar case, Your Honor, involved alleged misdisclosures to investors. The assigned claims case, as Your Honor knows, involved alleged breach of investment management agreement.

And, most importantly, in neither of those cases on the motions to dismiss was the issue before the Court that is the only issues -- two issues before the Court today. The Court need only to decide really two issues, core issues on this case. The first is has the Trustee pled

with particularity facts which make it plausible if the Defendant here actually knew -- that is, knew without any substantial doubt -- actually knew that Madoff was not trading securities. That's first.

And the second point that they have to establish is did they plead with particularity facts which show that -- two-pronged. That showed willful blindness, which has two prongs: One, that the Defendants each believed that it was highly probably that Madoff was not trading securities and, second, took action to purposely try to avoid learning that truth. Those are the issue today. Neither of those issues was before the Court on the Anwar motion or the assigned claims case. Indeed, they're not really in those cases. The Court did not consider those issues on those motions.

And so we submit, Your Honor, that those cases do not provide guidance for the Court here. What the Courts have done in these cases -- in our subsequent transfer cases, which this case is -- is they have looked at the pleadings before them in that case and they've gone through them with a fine-toothed comb, and they have made a determination as to whether facts, not conclusory allegations, but facts have been plead which show either, A, actual knowledge or, B, subjective belief and a high probability that Madoff was not trading securities. And secondarily -- and second, that they took actions to avoid

learning those facts. So, Your Honor, this is a separate case. The issues are entirely different. And, again, we submit that Anwar and the assigned claims cases do not apply here.

Let me, Your Honor, just jump right into an analysis of the complaint -- the complaint, because that's what's important. First, a word about -- and we take very seriously Your Honor's admonitions that we need to stay within the rules as to what's allowed on a motion to dismiss rather than a motion for summary judgment.

The rules in this district, Your Honor, allow, of course, review of the four corners of the pleading. In this case, that's the second amended complaint. However, they also allow reference to earlier pleadings -- in this case, the first amended complaint. And they allow reference to materials that are appended to pleading. In this case, there are over 100 exhibits that were attached to the first amended complaint. We're going to refer to a handful of them.

The Trustee has tried to make the point, Your Honor, that prior pleadings don't count. They cite a Third Circuit case to that proposition. The Third Circuit case, if you read it, A, it doesn't -- it doesn't stand for the proposition that they cited for. And, in any event, it says that the Third Circuit rule is followed by some other

circuits, and one of the circuits not mentioned is the Second Circuit.

So, the Third Circuit case on its face doesn't apply. But in any event, Your Honor, the cases in this district say that -- when there's an earlier pleading, the Court is entitled to look at the earlier pleading -- indeed, should -- if pointed to by counsel in the motion to dismiss; and that admission -- statements therein are taken as admissions in due course.

So, they don't necessarily overrule anything that's in the second amended complaint, nor are we arguing the statements in the first amended complaint or in the exhibits attached to the first amended complaint -- overrule anything in the second amended complaint. Our view is that it's all cumulative. And our view is that the facts that are set forth -- not the conclusory allegations -- because there's a massive difference in their pleadings between the allegations they make, the conclusory allegations they make, and the facts that they actually plead in the complaint.

But our contention, Your Honor, is that the facts, as plead in the second complaint, the facts as pled in the first complaint and the facts as set forth in the exhibits attached to the first amended complaint together all make it absolutely clear that these Defendants absolutely believed that Madoff was trading securities. Everything that they

did and everything that they said are premised on them believing that Madoff was trading securities.

And why do I say that? Well, first of all, let's look at -- let's look at the facts here. First, the invested millions of dollars of their own money and family money. They alleged that Mr. Noel alone invested $9 million in BLMIS. That's the first amended complaint, paragraph 49. They were planning to invest 50 million more in December 2008 of their own individual funds in BLMIS. That's on the eve of the collapse of Madoff Securities.

And this came at a time in the fall of 2008, when redemptions were pouring in to Madoff and, frankly, other funds because this was the financial collapse in 2008. Any sophisticated investor would know, as pointed out in one of the cases we cite to Your Honor, that any Ponzi scheme would be in serious trouble and would crater in those kinds of conditions.

It is absolutely implausible that anybody who knew Madoff was running a Ponzi scheme would ever invest in the Ponzi scheme, but it's certainly implausible -- and even more implausible that they would invest after these massive redemptions in the fall of 2008 when the Ponzi scheme was about to crater, which indeed it did a day or two later.

The Trustee's answer for this is well, they made millions of dollars in fees and therefore they had an

incentive. Except they didn't. The millions of dollars in fees that were made by the Fairfield Greenwich affiliated Defendants were made from the investments that their investors made. They were taking management fees, as is typical in the hedge fund industry. They were taking management fees and performance fees on those investments. They were going to get those fees whether they made personal investments or not. Their personal investments had nothing to do with the fees they earned.

They made personal investments because they wanted to share in the returns that were available from the investment advisory business of BLMIS. Again, and, Your Honor, it's completely inconsistent that they would do that. And so that's a glaring fact that stands out right at the outset.

By the way -- yeah, no. Second. They hired PWC to audit the Century Fund for years. PWC, that's in the second amended complaint, paragraph 140 and paragraph 200. That included site visits by PWC to BLMIS. Again, that's the second amended complaint, paragraph 140; first amended complaint, paragraph 396.

No rational fraudster would hire a Big Four accounting firm to go in over multiple years and make site visits to the site of the fraud. When they were -- when PWC was hired to audit the Century Fund, 95 percent of those

investments were with BLMIS.

Second. They did ongoing diligence and analysis of all BLMIS trades for Fairfield Greenwich. That's the second amended complaint, paragraphs 161, 278 and 283; first amended complaint, paragraph 36. Ongoing diligence and analysis of the trade. They spent "considerable expense" -- -- that's from the second amended complaint, paragraph 154 - to set up an office in Bermuda, a large part of whose mission was to do due diligence on Madoff and to do risk modeling and risk analysis.

They alleged on Madoff -- that's in the second amended complaint, paragraph 161; first amended complaint, paragraph 232; see, also, second amended complaint, paragraph 154. So, they're alleging that the Defendants here set up a separate office at considerable expense, their wording, to do diligence on Madoff over years, and years, and years. Continuous diligence and risk analysis and monitoring.

Why would anyone do that if they actually knew Madoff was not trading securities? Why would they do that if they believed it was highly probable that Madoff was not trading securities? Why would they do that if their intent was to stick their head in the sand and not learn the truth?

It's the opposite. Due diligence, Your Honor, is the opposite of trying to not to learn the truth. Due

diligence is trying to learn the truth. So, again, that's completely inconsistent with what they have to prove --

THE COURT: Let me interrupt you.

MR. CUNHA: Sure, Your Honor.

THE COURT: As you know, on a motion to dismiss --

MR. CUNHA: Yes, Your Honor.

THE COURT: -- the judge has to look at what's most favorable to the pleadings. And you're going off what I consider to be evidence. So, can we sort of focus back?

MR. CUNHA: Yes, Your Honor. It's actually not evidence that I'm citing. I'm actually citing the factual allegations in the complaint. So, I'm not citing any evidence here. These are -- these are their pleadings, these are what they said.

THE COURT: Okay. All right.

MR. CUNHA: And what the Court (indiscernible) said, Your Honor, is that in this kind of -- in this kind of a motion where it's a subsequent transfer and the Court has to determine whether or not the subsequent transferee had actual knowledge that Madoff was trading securities or not, what the Court has to do is parse through the pleadings, the factual allegations in the pleadings to make a determination as to whether, on those factual pleadings, those factual allegations, it's plausible that Madoff was trading securities.

THE COURT: Okay.

MR. CUNHA: So -- so, what we're doing here, Your Honor, is what all of the litigants have done in the prior cases and what the courts have indicated what the litigants should do, which is point the Court to the factual allegations in the pleadings, and then allow the Court to exercise the Court's judgment, which is basically common sense, as Your Honor knows from the Iqbal standard, and decide on those factual allegations that have been pled -- not the evidence -- factual allegations that have been pled, is it -- have they made a plausible case that these Defendants thought Madoff was a fraud, or had actual knowledge that Madoff was a fraud, was not trading? Or believed it highly probably that Madoff was not trading and stuck their heads in the sand and did what they could to avoid learning the truth?

And what we're saying, Your Honor, and the reason I'm taking you through these allegations in detail is because the factual allegations, when you strip away their conclusory conclusions and charges, and when you look at the actual facts they plead, it's completely improbable that these Defendants actually knew Madoff wasn't trading securities or believed it highly probable.

THE COURT: Okay.

MR. CUNHA: So, Your Honor, that's why I'm giving

you actual paragraph numbers in the second amended complaint and the first amended complaint. Because, again, this is -- this is exactly what courts are supposed to look at on a motion to dismiss, the factual pleading.

THE COURT: Okay.

MR. CUNHA: So, I'm not talking about evidence, Your Honor. Well aware that this is not a summary judgment motion.

THE COURT: Thank you.

MR. CUNHA: We could make it much stronger -- we could bring in a boatload of additional evidence which would support these allegations but, frankly, Your Honor, the allegations in the pleading make the factual case that it's completely improbable that the Defendants here thought Madoff was a fraud, or thought Madoff was not trading securities.

And, Your Honor, it's clear that that's -- that's the standard, that's what they have to show. And, by the way, the majority of court who've considered these subsequent transfer cases -- and there's a body of case law that involves bank and involves feeder funds, financial institutions that invested their investors' money in Madoff. There've been a number of cases that have been brought. There's a body of cases in this district where courts have considered exactly the issues that are before this Court

today, have looked at the pleadings. Those pleadings made many, many, many of the exact same allegations that the Trustee has made here. For example, with respect to all the red flags, the so-called red flags. Those courts have considered them and they've held that the red flags do not amount to actual knowledge and they don't amount to willful blindness.

Why? Because the red flags go to what Madoff is doing. They were pretty well known in the marketplace, a lot of people knew them. By the way, the Trustee has not chased most of those people. The Trustee has not chased net losers like the funds are here. Anyway, the Courts have found that the red flags do not equate to a pleading of actual knowledge, they do not equate to a pleading of willful blindness.

We point Your Honor specifically -- and these are cited in our briefs -- to the Legacy case, the Merkin case, the BNP Paribas case, and the ABN AMRO case -- ABN AMRO Ireland case.

Just -- I don't want to belabor this point too much, Your Honor, but this is the heart of what Your Honor has to decide. I just want to point out quickly the other factual allegations in their pleadings which make it utterly improbable, utterly implausible that these Defendants thought Madoff was not trading securities.

So, not only did they set up a Bermuda office, the Trustee alleges, to do diligence on an ongoing basis; they also hired an outside consultant to analyze for years the outside -- these trades. That's in the second amended complaint, paragraphs 143 and 145. Mr. Kazanoff had sent in with his declaration as part of our submission on this motion his Exhibit 2. And those are trading summaries that Mr. Berman put together, just an example of the trading summaries that he put together. They're referred -- these summaries are referred to explicitly in the second amended complaint, paragraph 143, so we are allowed to refer to them on a motion to dismiss. And they show that Berman thought Madoff was trading securities. He's analyzing, in a very detailed way, the trades that Madoff made.

If Berman thought he wasn't trading securities, he would have said, Madoff's not trading securities. There's nothing to analyze here. There's nothing to diligence. But, more importantly, if Fairfield Greenwich folks thought that Madoff was not trading securities, they never would have hired Berman in the first place. Why -- why do you hire someone to analyze the trades, an outside consultant at expense to analyze trades when you know there are no trades? It makes no sense.

Next. The Fairfield Funds together invested billions of dollars, they allege, in BLMIS. However, they

were net losers. At the time that BLMIS went under, the Century Fund alone lost over a billion dollars. One billion. Over a billion. Greenwich Century lost over 100 million. Greenwich Century Partners, it was much, much smaller, but it also lost millions.

The Court in BNP Paribas made the point that even to earn tens of millions of dollars apiece, which happened there, as it happened here, but to risk billions of dollars in something you know is a Ponzi scheme and is going to go under by sophisticated investment professionals whose job it is, whose entire career it is to be investment professionals -- to put billions of dollars in to something you now is a Ponzi scheme and is bound to fail at some point is, "nonsensical boarding on the absurd."

What else did they do? Well, they -- there were internal communications, Your Honor, which are attached -- which are attached to the first amended complaint. These are exhibits to the first amended complaint. And I'm not going to belabor this, Your Honor. It's very fast. I'm just going to very quickly give you a smattering that show that the internal communication of Fairfield Greenwich people, one to another, were all premised, all of them, in all of the exhibits that they submitted -- were all premised on the understanding and belief of the Fairfield Greenwich people that Madoff was not trading securities.

And this is very important, Your Honor, because what the Trustee has said is, oh, all this due diligence that they did and hiring Mr. Berman and hiring PriceWaterhouse, we can explain that. Fairfield Greenwich was trying to create an elaborate façade so they could tell investors they were doing this and therefore attract the investors and people to invest the investors' money and make these all fit.

I think that's not only improbable that anybody would go to these lengths -- actually spend the money, do things like hire Mr. Berman, which is not something that they disclosed to the shareholders, in order to have this elaborate rouse to attract investors. Completely not plausible.

But in any event, Your Honor, the very -- the internal documents -- so, either the conversation from one Fairfield Greenwich person to another, or conversations between a Fairfield Greenwich person and Mr. Madoff were all premised -- and you'll see it, because I'm just going to give you a quick smattering -- were all premised on the belief that Madoff was trading securities.

So, if we look at Exhibit 39. This is a transcript of a call between Mr. Vijayvergiya, who's a Defendant here, and Mr. Madoff. And they claim there was something untoward and they quote from the notes of this

call, which -- by the way, which they have characterized in the first amended complaint as a transcript of the call. So Your Honor can take it as accurate. But if you actually read -- if you actually read it -- and, Your Honor, this is a theme. They make charges in conclusory statements, and then when you look at the facts, the facts do not support the conclusory statement.

So, here we see at page 40, 66, and 84, Mr. Vijayvergiya asking detailed questions of Mr. Madoff about his operation, about his trading. Mr. Vijayvergiya, you remember, was hired, they allege, to do diligence on Madoff, and what we see in this transcript is Mr. Vijayvergiya doing his job and trying to learn more about Mr. Madoff's trading.

Completely implausible that if Mr. Vijayvergiya had actual knowledge that Madoff was not trading securities or believed it highly probable that Madoff was not trading securities, that Mr. Vijayvergiya would have asked these questions. You don't ask due diligence questions about trades that you know are nonexistent.

It also showed -- it also showed that far from sticking their heads in the sand, Mr. Vijayvergiya was trying to learn the truth, which is -- so that he asked detailed questions -- again, detailed questions about Madoff's trading operation.

Next paragraph -- Exhibit 41. We have an email

from Mr. Vijayvergiya to Mr. Murphy in 2008, August of 2008 again, attached to their complaint -- their first amended complaint. And in it, Mr. Vijayvergiya says, well, we're preparing 12 pages of outstanding operational due diligence questions for BLM. Why would you ask -- why would have 12 pages of operational due diligence questions if you know there are no trades? There's nothing to diligence. Also, the opposite of sticking your head in the sand. A due diligence questionnaire is detailed, trying to find out more about the operation.

The flipside of that refers to Mr. Tucker, who's the Jeffrey. Verify the existence and the segregation of assets in the past by tracing stocks from a trade blotter to the stock record, to the DTC and back to client account. We plan to repeat this check during our upcoming due diligence.

And this is an area, Your Honor, where they've made a charge which is completely undercut by the facts that they plead and by the facts that are set forth in the exhibits that they attach to their amended -- excuse me, to their first amended complaint. You remember, Your Honor -- you may remember from the pleading, Your Honor, that they alleged that there were some articles that were published -- one was in Barron's, one was in MARHedge -- in 2001, which raised questions about Madoff, complained about his secrecy, raised other questions about Madoff's operations.

And the allegation in the second amended complaint is that Fairfield Greenwich did nothing about that. The truth in the facts that they actually plead is, as indicated in their own exhibit, Mr. Tucker actually paid a visit -- he paid a visit to Madoff offices and he made them show him the books and records. He made them show him the trade -- that trade blotter, and he traced that to a screen which had DTC on it. They showed him a DTC screen. They asked Mr. Tucker to pick two securities positions that Fairfield had with BLMIS. Mr. Tucker did that. Then they showed him how those positions existed on their books and existed on the DTC screen. And Mr. Tucker recalled from his own understanding of Fairfield positions that they tied out.

So, again, they say one thing but they -- but their exhibits -- they say one thing in their conclusory charge, but the exhibits are completely to the contrary. And, Your Honor, that's -- that's not the only evidence of -- that's not the only evidence of -- of that meeting, of that visit by Mr. Tucker. It's also set forth in their exhibit -- their Exhibit 85, in Mr. Tucker's sworn testimony where he lays out in detail what happened in that meeting.

Yeah, so just a few more things, Your Honor, not to belabor this. But, again, Your Honor, this is the heart of what Your Honor has to decide and I just think it's terribly important that Your Honor understands just how

different the actual facts that they have pled and incorporated through their exhibits -- how different the facts are from their charges in their second amended complaint. And, Your Honor, you yourself said on page 6 of your recent decision on the other case, the assigned claims case, that conclusory allegations are to be disregarded. And you go right -- you pare it down to look at the facts. And we look at the actual facts pled. They just don't hold up. In fact, they actually prove the opposite, that the Fairfield people thought Madoff was trading securities.

Just a few others. Page 40 -- excuse me, Exhibit 47 from Mr. Blum of Fairfield to Mr. Tucker of Fairfield. This is in 2003. Mr. Blum says, I'd like you to check. It seems like Madoff was starting to liquidate a day or two earlier than usual. Is this driven by the fact that he's become so large that liquidating requires more lead time?

Again, liquidating what? Obviously premised on the thought that Madoff was trading securities and asking about his liquidation strategy. Again, an internal communication. This isn't some phonied-up -- there's no possibility that this is some phonied-up communication for investors. Internal communication between FGG people, premised on Madoff trading securities.

Exhibit 61. Madoff may have $20 billion invested in the AUM -- in assets under management, in the strategy.

Mr. Lipton, Fairfield Greenwich: That could be right. He's been doing this for 40 years. Exhibit 65. Phone conversation between Mr. Vijayvergiya and Mr. Madoff in June of 2008. Again, what it shows is Mr. Vijayvergiya asking detailed questions of Mr. Madoff, in this case, about the option strategy and the counterparties to the option strategy. Asking, what are the exposure limits? At what point are the puts trading? Does BLM have to post performance assurance? These are all detailed questions about trading premised on his understanding that Madoff was trading. It's completely implausible that he would be asking Madoff these questions if he actually knew Madoff wasn't trading. There's -- there would be no puts or options to analyze, or to have exposure limits on.

68 from Mr. Della Schiava, again, Fairfield Greenwich, to Mr. Vijayvergiya and back and forth between them. And they're talking about Mr. Madoff's strategy of remaining in cash at the end of certain years. Again, premised on trading, number 76. Options activity, discussing Madoff options activity. Again -- and this is Vijayvergiya -- and, again, this is Mr. Vijayvergiya. This is between Mr. Vijayvergiya and Mr. Berman. So, again, based on a mutual understanding that Madoff was trading securities and trying to understand more about how he was doing it.

That's enough, Your Honor, you get the idea. But the point is this. Every single one of these document is premised on a belief that Madoff was trading securities. None of these documents -- and we submit, Your Honor, none of the exhibits to the first amended complaint, and none of the actual factual allegation in either the first amended complaint or the second amended complaint actually show if any Fairfield Greenwich Defendant here or any person associated with Fairfield Greenwich had any knowledge whatsoever that Madoff was not trading securities or any believe whatsoever that Madoff might not be trading securities.

They all show the opposite. That everything that they were communicating to each other, everything that they did was premised on them believing Madoff was trading securities.

Let's look at -- let's look at the facts which they... By the way, they don't tell, Your Honor, what facts they think show actual knowledge or willful blindness. I guess they leave it to Your Honor to try to figure that out on your own, even though that's what you have to decide on this motion. And they admit in their brief in opposition -- they flat out admit, Your Honor, there is no fact. There is no fact which shows actual knowledge or willful blindness.

None.

So, then they ask Your Honor -- they say, but look at the totality of the facts. Somehow or other this collection of facts, none of which show actual knowledge and none of which show willful blindness, are supposed to add up in their totality to a showing of actual knowledge and a showing of willful blindness. Well, they don't. There's no facts. And Your Honor can ask them. Point me to the paragraph numbers, where the facts are alleged which show actual knowledge.

And if you look at the cases that we referenced to Your Honor, all those cases focus on specific allegations that either do, in the Court's opinion, or do not, in the Court's opinion, show actual knowledge that were pointed to by the Trustee. The Trustee doesn't even try to point to a specific fact here. He just says, somehow, Your Honor, from the penumbra of facts, Your Honor is to try to -- should reach the conclusion that there was actual knowledge or willful blindness here. And it's baloney. Because the specific facts -- and we've pointed Your Honor to the specific facts -- the specific facts that are pled and the specific facts that are in the exhibits to the first amended complaint show the opposite. They show that the Fairfield Greenwich operators, the Fairfield Greenwich Defendants all thought Madoff was trading securities.

So, take a look at some of the things they do. They do point to some facts, so these are the ones we assume they think that altogether add up to actual knowledge. Well, let's look at them. They say that Madoff was close friends -- close friends with the Fairfield Greenwich Defendants. They were close friends. They don't say which ones but they say, Fairfield Greenwich Defendants were close friends with Madoff. And what do they point -- and that's what they say.

But what do they say -- what do they actually say about the relationship? The actual facts. So, first, there is a -- and I'm going to assume this is an error, Judge. I'm going to assume it was not a willful attempt to mislead the Court. But they say in the second amended complaint at paragraph 110 that there were many, many contacts -- 44 contacts between Tucker and -- I'm sorry, they say in their brief, in their opposition brief at page 17, that there are many, many contacts between Tucker and Noel, FG Defendants, with Madoff in the period 1997 and '98. 44 by Tucker and 10 by Noel. '97 to '98. And they reference for that second amended complaint, paragraph 110.

When we actually look at the second amended complaint, they don't allege that it was one year, which they do in their brief -- they allege that that was over 12 years. That's a massive difference, Your Honor. So, what

they actually allege, the facts that they actually allege is that Mr. Noel visited with Mr. Tucker less than one time per year and that Mr. Tucker visited with Mr. Noel less than four times per year. They also allege that Mr. Vijayvergiya visited with Mr. Noel one or two times per year.

Again, Your Honor, Century had billions of dollars invested with BLMIS, 95 percent of Century's assets were invested with BLMIS. Less than one time a year, less than four times a year, and one or two times per year between principals -- Mr. Tucker was in charge of the Madoff relationship, they allege, and Mr. Vijayvergiya was in charge of doing due diligence on the Madoff trades. That doesn't look like close personal friends, Your Honor. That looks like sort of the minimal that you would expect for in-person contact with probably your most important business contact. And, again, they completely -- they completely misrepresent that in their brief.

What else? Oh, the SEC. They claim that there was an effort by Fairfield Greenwich people, specifically Mr. Vijayvergiya, to mislead the SEC when it investigated Madoff in 2005 and 2006 to make a determination as to whether Mr. Madoff should register as an investment advisor because of the -- his activity on the investment advisory business at BLMIS.

First, they don't say how even if that happened,

which it did not, and if you look at the documents that they quote from and attach as exhibits, there was no effort to mislead the SEC. But even if there was, that doesn't mean there was actual knowledge that Madoff was not trading securities. It also doesn't mean that they believed it highly probably that Madoff was not trading securities.

And, in any event, Your Honor, if you look -- if you actually look at the SEC, the transcript of the call, the notes of the call, the Trustee's conclusory allegation that they were trying to mislead the SEC are belied by the actual notes of the conversation, which... And we refer Your Honor to the first amended complaint, paragraph 358, and to Exhibit 3, which is attached to the Kazanoff declaration, which was also an exhibit to the first amended complaint. And we also point Your Honor to the second amended complaint, paragraphs 254-259, which quote from the notes. There's nothing misleading about what Mr. Vijayvergiya told the SEC.

We've already mentioned to Your Honor that the notes, which they call as accurate as a transcript, and that's in the FAC first amended complaint, paragraph 39, a true and accurate transcript -- we've already mentioned that those notes show Mr. Vijayvergiya asking Mr. Madoff detailed diligence questions about Madoff's trading operations. So, again, the notes of that call, far from going to show actual

knowledge or willful blindness, show the opposite. They show Vijayvergiya believing Madoff traded and they show Vijayvergiya doing diligence, trying to learn more about the trading operation, the opposite of head in the sand, which a finding of willful blindness requires.

I've already mentioned, you know, Berman, the outside consultant that was hired by Fairfield Greenwich to diligence Madoff trades on an ongoing basis, to analyze them, and the document that's referred to in the second amended complaint, paragraph 143. It's also attached to Mr. Kazanoff's declaration as Exhibit 2, which shows Mr. Berman thought Madoff was trading.

And it also shows -- if you look at their second amended complaint, paragraph 143 -- that Mr. Berman's concern wasn't that Madoff wasn't trading. He never said to Mr. Vijayvergiya or anybody else, I'm concerned that Madoff's not trading securities. I -- you know -- what he said is, I'm concerned that some of these trades -- and they point to a handful of instances over many years -- that many of these trades are outside the strategy.

Well, outside the strategy, he has to be executing the strategy. There has to be trades. So, again, the opposite of actual knowledge, Your Honor. And, by the way, courts have said that trades outside the strategy over a period of many years are not even a red flag. At best,

they're a pale pink, to quote one of the Courts.

What else? They point to a meeting with Madoff in October of 2008 with the Fairfield Greenwich people at which the Fairfield Greenwich people ask Madoff for additional information on option county parties. That's reactive diligence, Your Honor. That's first amended complaint paragraph 430. Again, the opposite of willful blindness and the opposite of actual knowledge.

Finally, they point to comments by third parties. I think what's most important about those comments is -- none of those comments was anybody coming to Fairfield Greenwich and saying, hey, Fairfield Greenwich, this guy's a fraud. That's not what they -- that's not what they say. What they do is they come to -- if you look, they come to Fairfield Greenwich and they point out one aspect of Madoff's operations or another that they don't like, and that they're not going to trade with Madoff because of that.

Again, these are the red flag aspects of Madoff's operation, which the courts have unanimously rejected as sufficient to show actual knowledge of willful blindness. One court said -- and this is the BNP Paribas court -- that these comments from third parties don't establish anything about the actual knowledge or subjective believe of the Defendants receiving the comments, and it's just, "pleading by innuendo" and rejected them as a reason for finding

actual knowledge or willful blindness.

Then they -- then they end by saying, well, there are aspects of BLMIS's operation that remained unclear to Mr. Vijayvergiya in late August of 2008, and that's the second amended complaint, paragraph 169. Well, again, that's exactly the opposite of actual knowledge. If operations are unclear to Vijayvergiya, there had to be operations. If Vijayvergiya had actual knowledge Madoff was not trading, it would be crystal clear to him what Madoff's operation was. There was no operation.

Your Honor, What's not pled -- what's not pled is also very telling. The second amended complaint plea in paragraph 75, that close friends of Mr. Madoff got targeted returns. So, these were people who came to Madoff and said, Bernie, I would like, you know, a 20 percent return this year, and Bernie gave it to them.

What's important about that is Fairfield Greenwich is not listed among those friends. No Fairfield Greenwich person. No Fairfield Greenwich fund is listed among a friend of Madoff that got targeted returns.

See also paragraph 34 of the second amended complaint. Fairfield Greenwich people are not listed among the close friends that are referred to in paragraph 34 of the second amended complaint. Paragraph 33 and 69 (indiscernible) of the second amended complaint plead by

name, eight others besides Madoff who were in on the conspiracy. Again, no Defendant is listed here.

What else isn't in there? None of the -- none of these eight conspirators who pleaded guilty, some of them pleaded guilty, and they gave allocations -- excuse me, I may have mispronounced that, Judge -- to the Court. Not one of these people has charged that Fairfield Greenwich was in on the fraud, or any person at Fairfield Greenwich was in on the fraud. So, not surprisingly, there are no such allegations.

Second. Now federal authority and no New York State or New York City authority has charged anyone associated with Fairfield Greenwich or any entity associated with Fairfield Greenwich with any even civil -- certainly no criminal charges -- there are no civil charges. The New York AG's Office investigated and brought no charges. The Department of Justice brought no charges. The District Attorney's Office in New York City brought no charges. And they investigated. And, by the way, we understand that the Trustee has access to the investigatory records, including productions by Fairfield Greenwich to those government authorities, has access to (indiscernible).

So, again, there's no allegation there that the government had charged Fairfield Greenwich with anything, and there's no allegation because it didn't happen.

Your Honor, my colleague, Ms. Eichenberger, will talk a little bit more about the necessity that Your Honor go on a defendant-by-defendant basis, and that the requirement in the law is that actual knowledge of willful blindness be established with respect to each individual Defendant; and to the extent that it's not, with respect to an individual Defendant, Your Honor must dismiss.

But in that regard, I will just make the point that there are no allegations whatsoever with respect to Defendant Corina Piedrahita, there are no allegations whatsoever with respect to Mr. Philip Toub. There are virtually no allegations whatsoever with respect to Andres Piedrahita. Virtually no allegations whatsoever with respect to Mr. Noel. All those four Defendants should be just dismissed out of hand because they don't even attempt to meet their obligation to plead facts that show actual knowledge or willful blindness on the part of any of those four.

What they try to do is impute knowledge up from other Fairfield Greenwich people to this partnership that they claim exist in Fairfield Greenwich group. And then impute down from Fairfield Greenwich group to those four, as if everything the Fairfield Greenwich group somehow knew from other people, these folks knew. And the point will be made by Ms. Eichenberger --

THE COURT: Why don't we let her make the point? Why don't we let her make the point? There's no reason to be repetitive. There's no reason to be repetitive.

MR. CUNHA: Yes, thank you, Your Honor. I'll do that. And, finally, Your Honor, there's no allegation in -- Century settled. Century Fund was originally a Defendant in this case. The funds were originally a Defendant. And some time ago, the Century Fund, which is the big one, settled with the Trustee and there was a settlement agreement that was entered into and a judgment.

Interestingly enough, in that settlement agreement, there's no allegation and no statement that the transfers to Century are voidable or void. They had the opportunity to do it and they didn't do it.

Your Honor, I'm cognizant that you're being very generous with your time, and I'll try to skip ahead to the stuff that's just new. So, let's skip ahead to the two-year transfer. Under section -- and there are two sets of transfer tiers that Your Honor has to focus on: six-year transfers and two-year transfers. The six-year transfers are all the transfers -- the subsequent transfers to the Defendants here that arose out of initial transfers from the fund in the six years before the filing of the bankruptcy case.

So, what's being chased here are payments from

BLMIS to the fund -- that's the initial transfer -- and then transfers from the fund to the managers, who are the Defendants here, which was a subsequent transfer. And what the cases say is that the Court can void -- that the Trustee can have voided and recover six years of transfers only if they establish actual knowledge, actual knowledge that Madoff was not trading. And they plead that in a conclusory way, and they're seeking those six-year transfers on that basis.

They alternatively argue, Your Honor, that if actual knowledge hasn't been pled by them, that they've pled willful blindness. And the two-year transfers -- so for two years of transfers from the funds and then from the funds to the subsequent transferees, they don't need to show actual knowledge, they need to show willful blindness. This is under section 550(b) of the -- of the Bankruptcy Code, and it's also under section 548 (a)(1)(a) and 548(c) of the Bankruptcy Code.

To step back for a minute, the reason why you have to have actual knowledge is that under 546(e) of the Bankruptcy Code there's a safe harbor. It exempts securities transactions. It's been held definitively by the Second Circuit in the Fishman case that the Madoff transfers to its customers -- so exactly the initial transfers we're talking about here; the transfers from Madoff to his

customers, Century Greenwich, Century Greenwich, Century Partners -- that those transfers absolutely are subject to the safe harbor provision in 546(e), which exempt securities transactions, settlement payments, which exempts them from the ability of a Trustee to void -- to avoid and recover those transfers. 546(e).

So, that's what governs here. There is an exception to 546(e) which is for actual knowledge, and that's why they have to prove actual knowledge for the six-year transfer. If they can't prove actual knowledge, then -- and prove is wrong -- if they can't state it by particularized facts in the pleadings, and that's what we're talking about, they could try to state with particularized facts willful blindness. That's under Section 548(a)(1)(a), because 546(e) doesn't apply to fraudsters. It doesn't apply to people with actual knowledge. And 546(e) does not apply to transfers that are referenced in Section 548(a)(1)(a). And (a)(1)(a) -- 548(a)(1)(a) allows recovery of two-year transfers, two years of transfer, except under 548(c). And 548(c) says the Trustee cannot avoid and recover if the transfers were taken by the transferees, and this applies to subsequent transferees as well, either for value and in good faith. Value and in good faith. That's the same thing that's said in Section 550(b), Your Honor, and it's under 550 to the only Bankruptcy Code cited in the

second amended complaint that they're trying to recover.

So, what does value mean in good faith? They have to establish value and they have to establish good faith. Well, the courts have held that value is only what's necessary to make a contract. It doesn't have to be sufficient value, it doesn't have to be adequate value -- it's what we all learned, I think, in day one of contracts, the Peppercorn.

And here, the courts have held that -- that on a motion to dismiss, the judge can divine value from the facts pled in the complaint. And here those facts establish it, again, under the authorities we've cited. The redemptions here -- these transfers here at issue, the initial transfers from BLMIS to the fund were for redemption. The funds were saying, we've got investors who want to take some of their investment out. And so the BLMIS sent those redemptions to the funds which, in turn, were sent to the manages, and the courts have held, well, those redemptions, they're for value because investors were giving up equity in order to get those redemptions.

So, value was given. And the Trustee has argued in other cases, well, that's not value because the equity was worthless. And the courts have said, no, the equity's not worthless at all. These folks have claims against the estate. And, in fact, they've recovered millions and

millions of dollars from the estate as a result of those claims. So, they add value. So value is found there in the equity given up for the redemption.

The courts have also said -- and I refer Your Honor to the Legacy case, which we cite in our complaint. Legacy. That value is given by managers for services performed by the Defendants. And here, the Trustee pleads many -- you know, pleads the usual range of services that funds give in return for the fees they earn. They manage the investment, they go out and find investors, they manage the flow of investments back and forth, they do diligence, they analyze the trades, etc., etc.

The Trustee's complaint is they don't -- they think the diligence wasn't good enough, that they don't think that the Fairfield managers did a very good job, but they don't dispute that the Fairfield managers did, in fact, manage these funds. And that is sufficient, the courts have held, to satisfy the value prong of what an investor has to show to be exempt under 550(b) and under 548(c) to not allow voidability. So, that's value.

Second, good faith. Judge Rakoff has held that the burden is on -- is on the Trustee to plead facts which show good faith. Good faith, the words themselves could be a little bit misleading. It's not generalized good faith. What the courts have held clearly, plainly and unanimously

is that good faith, in this context of seeking subsequent transfer, is a subjective belief in a high probability that there were no trades. Each Defendant has to have had a person subjective believe there was a high probability that Madoff was making no trades. And, second, have had to take active steps to avoid learning the truth.

Your Honor, the Trustee agrees that this is their burden, that this is the standard they cited in their brief in opposition. So, there's no real disagreement between the Trustee and us that the burden on -- that the burden that the Trustee must -- must meet is to plead facts with particularity, and Rule 9(b) does apply because it's fraud -- plead facts with particularity, which establish that there was actual knowledge that Madoff was not trading for the six-year claim, and that they must plead facts which establish -- for the two-year transfers, plead facts which establish each Defendant had a subjective believe in a high probability that there were no trades, and took active steps to avoid learning the truth.

I won't go through the list of facts again with Your Honor that we went through earlier, but all of those facts that are pled in their complaint and that -- and that are in the exhibits to the first amended complaint, all of those facts that show that the Fairfield -- that show that the Fairfield Greenwich Defendants here believed Madoff was

trading securities, they negate actual knowledge. Of course, they also negate willful blindness. Because they thought Madoff was trading securities, so obviously they did not have a subjective belief in a high probability that Madoff was not trading.

On the second prong, taking steps to avoid learning the truth. Here again, the facts are to the -- are the opposite. Not only did they not take steps to avoid learning the truth. The steps that they took were to try to learn the truth. Again, we referred Your Honor to the pleadings and the exhibits showing Mr. Tucker's visit to Madoff to physically inspect the books and look at a DTC screen, which was phony, by the way, but he didn't know that -- to look at a DTC screen to actually ascertain and to prove to himself that the trading was going on.

They say that -- they point to Friehling & Horowitz. Friehling and Horowitz was a small auditor that was used by Madoff, based in a strip mall, only three employees. They say, ha, that's too small of an auditor, too small and obscure of an auditor for an operation like the investment advisory business at BMLIS. Fraud. They must've known there was a fraud. And then they say in a conclusory way, they did nothing -- they did nothing to investigate Friehling & Horowitz. However, the facts they plead are exactly the opposite of that. And, again, this is

a pattern. They make a charge in a conclusory way, and then you look at the fact that they point to, and the fact points to the exact opposite of what they want Your Honor to conclude.

They looked into -- the facts that they plead is that they looked into Friehling & Horowitz. There were calls made from Mr. Madoff. They made a call to Mr. Madoff. They called Mr. DiPascali twice. They did research on Friehling & Horowitz and they alleged that in October 2008, there was a due diligence visit in which... Withdrawn.

So, anyway, they say they did nothing to investigate Friehling & Horowitz, but then the facts they plead show that they, in fact, did investigate Friehling & Horowitz. Again, this is the opposite of sticking your head in the sand. It's the opposite of taking steps to avoid learning the truth. They took steps to learn the truth.

The case as availed, Your Honor, is doing due diligence is the opposite of willful blindness. And we would point Your Honor to the Legacy case, the BNP Paribas case, the Elendow case, the ABN AMRO Ireland case.

So, Your Honor, this brings me to the end of my presentation. We would ask that Your Honor dismiss the subsequent transfer counts, counts 1-14 in the complaint for failure to plead facts with particularly which show that any Defendant had actual knowledge that Madoff was trading -- to

trading securities; for failing to plead facts which show that the Defendants had a subjective belief in a high probability that Madoff was not trading securities; for failure to plead facts which show Defendants sticking their head in the sand and trying to avoid learning the truth. We submit that the facts show -- all of them together, all facts and altogether in totality show that the Defendants very much believed Madoff was trading securities. So, no actual knowledge is pled, no willful blindness is pled. We submit it would be futile to re-plead given the factual picture that emerges so clearly from the facts they've already pled.

And, Your Honor, they've had three tries at this. This is their third -- this is there second amended complaint. So, there's the complaint, first amended, second amended. It's been more than 12 years that this litigation's been proceeding, more than 12 years. The Trustees have had massive discovery already in that period. They've had access to all of Madoff's documents, all of them. And so they've seen all of the communications from Madoff's side. They've also had hundreds of litigations in which they've gotten a massive amount of discovery from other -- from other participants in the BLMIS Investment Advisory business, and they've had access and given documents specifically about Fairfield Greenwich Defendants

from government investigations.

There were more than 100 exhibits attached to the first amended complaint. So, these complaints have been made by the Trustee on a very, very, very substantial factual record. Enough is enough. He's had more than enough time, he's had had more than enough discovery, he's had more than enough cracks at it. The facts overwhelmingly show that the Fairfield Greenwich Defendant thought Madoff was trading securities and Your Honor should not allow an amend.

That brings my argument to a halt, Your Honor. With Your Honor's permission, I'll turn it over now to Sarah Eichenberger, who has a much briefer argument with respect to the matters that I mentioned.

THE COURT: Please. Thank you.

MR. CUNHA: Thank you, Your Honor.

MS. EICHENBERGER: Good morning, Your Honor. Sarah Eichenberger from Simpson Thacher & Bartlett on behalf of Defendants. Can you hear me okay?

THE COURT: Perfectly. Thank you.

MS. EICHENBERGER: Okay, great. So, as my colleague, Mr. Cunha, just explained, the Trustee was required to include specific facts establishing that each individual Defendant had actual knowledge, or that they subjectively believe that BLMIS was no trading securities. I

fact, those parties here agree that Rule 90 governs at least a portion of the claims dealing with the six-year transfers. And, further, that Rule 90 generally requires particularized allegations on a defendant-by-defendant basis.

So, what the Trustee here has a burden of alleging with facts specifying each individual Defendant's alleged contribution to the purported (indiscernible) and identifying each individual responsible for each purported act. And the Trustee argues that the standard here should be relaxed because the bankruptcy Trustee is an outsider to the fraudulent transactions. But as Mr. Cunha discussed, this particular Trustee knows a great deal about BLMIS and its affairs. And in any event, courts are very clear that even if the standard is relaxed, it's not an elimination of the particularity requirement.

And the complaint here has not pled facts on a defendant-by-defendant basis showing that any individual subjectively believed or actually knew that BLMIS was not trading securities. And also, take for example, Defendant Corina Noel Piedrahita. So, as Mr. Cunha supplied, the complaint contained virtually no allegations as to Corina Piedrahita. In fact, with respect of her state of mind, it only alleges a mere two things. One is that she controlled an entity called Share management, and that's in paragraph 129 of the complaint; and, two, that her knowledge is

imputed to Share Management, and that's at paragraph 129 and 329.

But what's missing from the complaint are any specific allegations as to what Ms. Piedrahita knew and why. And the same is true with the other Defendants, including Mr. Philip Toub and Mr. Andres Piedrahita. The complaint contains virtually no allegation as to their subjective state of mind.

In fact, as my colleague Mr. Cunha just explained at length, the facts pled as to the individual Defendants show that collectively they believed that BMLIS was a legitimate operation and that it was, in fact, trading securities.

So, what the Trustee here does in lieu of particularized pleadings is to prevail on two different theories of imputation. First he claims that there is an inside exception that applies and allows him to impute knowledge to all Defendants. But as we make clear in our papers, Your Honor, the insider exception that the Trustee is invoking is actually unique to the security context. It only applies when there's a question as to the authorship of a challenged document, and that's not the case here.

The Trustee's second tactic is to rely on a purported de facto SGG partnership. But, as we have previously stated in our papers, Defendant contends that no

such partnership ever existed. And even if such a partnership did exist, it still doesn't solve the Trustee's pleading problem and there are two reasons for this. One, there are no facts establishing actual knowledge or willful blindness of any single Defendant. And, second, using SGG as a pleading device is contrary to (indiscernible) law.

The case law is clear that knowledge can only be imputed in one direction, and that's from an individual to a partnership entity. It cannot be imputed from the partnership entity down to the individual. And there's a good reason for this. You can't impute a subjective state of mind from one individual to another, because imputed knowledge is at its core constructive knowledge. It's akin to saying that even if an individual didn't actually know a fact, he should have known a fact. And so the imputation standard that the Trustee is advancing here is really just an attempt to do away with the subjective pleading requirement and to impose an objective standard that courts in this circuit have rejected.

And, Your Honor, I submit that even Anwar, which the Trustee relied upon in his papers and which held that the Plaintiff in that action has sufficiently pled the existence of a de facto SGG partnership -- even there, the Court refused to engage in the type of institution that the Trustee is urging here. You know, in that action, the Court

held that the Plaintiff had not pled (indiscernible) in Mr. Piedrahita, who was one of the alleged members of the de facto SGG partnership, and who also happens to be a Defendant in this action.

So, Anwar therefore rejected this idea of group pleading and refused to impute the subjective state of mind from other individual alleged partners to the remaining partners.

And, Your Honor, therefore, for all of the reasons Mr. Cunha and I have discussed, the Trustee has not pled actual knowledge or willful blindness as to any individual Defendant and he should not be allowed to prevail on (indiscernible). And unless Your Honor has additional questions on that, I can shift gears and move to our defenses to counts 15-17 of the (indiscernible).

THE COURT: Very good. If you all don't mind, we're going to take a ten-minute break. So, we'll be in recess for ten minutes.

(Recess)

THE COURT: We're back on the record. Ms. Eichenberger, you're back on the record.

MS. EICHENBERGER: Thank you, Your Honor. I can continue with the general partnership claims.

THE COURT: Would you do me one big favor? You need to speak louder. You're not being picked up clearly on

the record.

MS. EICHENBERGER: Understood, Your Honor. I will do that. Is this a little bit better?

THE COURT: That's perfect. Much better, thank you.

MS. EICHENBERGER: Great. So, continuing on, Your Honor, to count 15-17 of the second amended complaint. So, the second amended complaint alleges that Defendant Fairfield Greenwich, LTD and Fairfield Greenwich Bermuda, LTD are liable for satisfying the six-year initial transfer claims against two of the funds, Greenwich Century and Greenwich Century Partners. But as we discussed in our papers, Your Honor, that claim is preempted by the Federal Bankruptcy Code and by Section 546(e) in particular.

Just to take a step back, the Trustee is trying to frame his claims against Fairfield Greenwich, LTD and Fairfield Greenwich Bermuda, LTD, as general partnership liabilities. But what the Second Circuit held in the Tribune case is that the Court needs to look not at the way the Trustee has labeled his claim, but at the nature of the underlying claim. And if those underlying claims conflict with federal law or congressional intent, they are preempted.

So, here, the claims for which the Trustee is seeking to hold FGO and FGB liable are the avoidance claims

that he has made against Greenwich Century and Greenwich Century Partners. And those underlying avoidance claims against the funds are either governed by or preempted by the Federal Bankruptcy Code. More specifically, the claims against the two funds fall within two different statutory reviews. The first is the Securities Investor Protection Act, which expressly imports the Federal Bankruptcy Code and, by extension, the Section 546(e) safe harbor.

And the second framework that the Trustee is using to avoid the claims against the fund is the New York State Fraudulent Transfer Law, the New York Debtor & Creditor Law. And as the Second Circuit made clear in Tribune, the Federal Bankruptcy Code is designed to create a comprehensive system of preemptive federal regulations in this area. In fact, what the Second Circuit says is that the bankruptcy constitutes a wholesale preemption of state laws regarding creditors' rights.

And the reason is because the safe harbor in Section 546(e) was expressly designed by Congress to protect the finality of transfers like the ones here that were taken in good faith. And if the Trustee is allowed to claw back those transfers by simply affixing the language of general partnership to those claims, it would frustrate Congress's intent.

So, Your Honor, for that reason, we submit that

Congress plainly intended to preclude the Trustee from using general partnership liability as a workaround for other state law concepts and, therefore, for those reasons we submit that counts 15-17 of the complaint should be dismissed.

And unless Your Honor has any questions, I'll turn it over to my colleague, Mr. Fletcher Strong to discuss --

THE COURT: Please. I have no questions. Thank you.

MR. STRONG: Morning, Your Honor. Fletcher Strong from Wollmuth Maher & Deutsch, counsel for Defendants Fairfield Investment Fund, LTD, which I'll refer to as FIFL, and Stable Fund, LP. I'll be presenting this morning on my client's Statute of Limitations defense that's unique to my two clients.

As Your Honor knows, Bankruptcy Code Section 550(f) requires all subsequent transfer actions to be brought within one year after the avoidance of the initial transfer.

Here the BLMIS trustee settlements with the Fairfield feeder funds occurred, at the latest, in July 2011, thus mandating that any subsequent transfer claims had to be brought on or before July 2012.

The operative second amended complaint in this action was filed on August 28th, 2020, which is more than

eight years after the applicable July 2012 deadline. Accordingly, the $62 million in new subsequent transfer claims that are alleged in the second amended complaint should be dismissed as time barred.

Now, the Trustee does not dispute this fact but argues instead that the untimely new claims relate back to the timely-filed first amended complaint filed in 2010.

To relate back under Federal Rule 15, the new claim must arise out of the same common core of operative facts alleged in the original complaint. Within the context of BLMIS claw back action, specifically Judge Bernstein held in the BNP case that subsequent transfer claims can only relate back if defendants were "at the center of a common scheme to strip assets from BLMIS."

The Trustee argues that this test is satisfied because the new claims against my clients purportedly revolved around Defendant's efforts to profit from fraud by charging the Fairfield funds management and performance fees.

This is simply false. It is actually undisputed that both FIFL and Stable never received a dime in performance or management fees. To the contrary, they actually paid out millions of dollars of fees every year to the Fairfield management entities that oversaw the BLMIS investments. Indeed, the Trustee's own reply brief

correctly refers to FIFL and Stable as funds of funds that merely invested in BLMIS through the Fairfield feeder funds.

The Trustee then argues, well, the untimely new claims should be allowed because they are part of the same underlying transactions alleged in the first amended complaint.

This argument should also fail. For avoidance actions, the general rule is that each transfer should be treated separately and distinctly for relation back purposes. Thus in the BNP case, even a reservation of rights to add additional subsequent transfer claims in the future was deemed not sufficient for Rule 15.

However, where the new transfers follow a similar pattern and generally the same amount and same time period, whether sent on a weekly or monthly basis or whatever it may be, those untimely new claw back claims could potentially be deemed timely and relate back.

Here, however, even a cursory review of Appendix A that was submitted with Defendant's motion moving papers shows that there is no discernible pattern whatsoever as to the timing or amount of the Trustee's new transfer claims, alleged FIFL and Stable that actually range in amounts from $91 on the low end all the way up to $15 million on the high end. Therefore, these claims cannot relate back to the 2010 first amended complaint.

For these reasons and the reasons set forth in our moving papers, we respectfully request that the Court dismiss the $62 million in untimely new claims alleged against FIFL and Stable.

With that, that's all I have, Your Honor, unless -- if there are any questions, I'd be happy to address them.

THE COURT: I have no questions. Thank you.

MR. STRONG: Thank you, Your Honor.

THE COURT: Anyone else in the motion to dismiss wish to be heard?

THE COURT: Very good. Ms. Thomas?

MS. THOMAS: Thank you, Your Honor.

I will start with the standard on this motion to dismiss because I think that we've gotten a bit far afield in terms of the facts that Defendant's attorney, Mr. Cunha has cherry-picked from the first amended complaint and from apparently other complaints that are not at issue in this action.

But again, this is a motion to dismiss. Viewing the second amended complaint in the light most favorable to the Trustee, the allegations establish a plausible claim that the Defendants shared knowledge and information and acted in concert, that they created numerous entities that they operated and controlled to generate over $1 billion in fees by funneling assets to BLMIS; that the Defendants were

aware of numerous warnings and indicia of fraud, including from a consultant that they hired; that the Defendants lied to investors and regulators to shield Madoff from inquiry, and that they did so with actual knowledge of the Ponzi scheme at BLMIS.

The Defendants allege due diligence as an element that shows they were not aware. The Trustee's allegations are very clear that the Defendants conducted due diligence as a performative action, merely to help create a veneer of legitimacy for BLMIS. And there are specific examples alleged in the complaint to support this conclusion.

What the Defendants did is they hired a consultant, Gil Berman, to summarize BLMIS's trades, but then they ignored concerns that Mr. Berman raised about indicia of fraud as early as 1996. He later made specific recommendations that they verify the assets were there, that they request trade confirms on the date the trades supposedly took place, not days later, and that they request information on options counterparties. The Defendants did none of those things.

The second amended complaint also alleges that the Defendants applied different standards to BLMIS than they did to other entities. That's in -- at Paragraph 149.

Investors raised concerns that Defendants lied and purported -- used their purported due diligence as a shield

for BLMIS. Again, there are many examples to support that this conclusion and these allegations. On the topic of dodging questions from investors, lying to investors, several paragraphs for good reference are 224, 228, and 229.

Mr. Piedrahita -- I think Mr. Cunha said something about internal correspondence, which indicated, you know, the Defendant's (indiscernible). Again, the Trustee is an outsider to the Defendant's scheme, so the Trustee is limited to alleging facts which show indicia and demonstrate indicia that the Defendants had actual knowledge.

Internal correspondence with the Defendants where a salesperson points out that a bank director says FGG is going to end up in jail if they don't clean up their act. These are the types of internal correspondence alleged in the second amended complaint.

We allege also after the Bayou hedge fund Ponzi scheme was discovered, again relying on their meaningless due diligence, the Defendants said to investors that their sophisticated due diligence would have caught the Bayou fraud, but then internally the conversations are joking. And I believe that's Paragraph 199 of the complaint.

The paragraphs -- the salespeople are joking about the similarities between the unqualified auditor in the Bayou case and BLMIS's auditor.

Mr. Cunha also mentioned this concept of the

auditor and that there was some due diligence performed with respect to the auditor. Again, what the Defendants did was they recognized that the auditor was not only not qualified but not certified to conduct audits. And instead of doing any legitimate follow-up, what they did was continue to lie to investors, and they did this to shield BLMIS from further inquiry.

Another example of the Defendants shielding BLMIS are the meetings with the SEC that are alleged in the complaint. The Defendants, Mr. Vijayvergiya and Mr. McKeefry, were tasked by the partnership with conducting those meetings with the SEC. And what they did was purposely lie to the SEC to downplay Madoff's role, and to make it seem that he didn't have unfettered discretion with respect to Century's assets. They tried to play up their own role to make it seem as if they were actually performing work for which they ultimately received almost $1 billion in fees.

The categories of allegations that are in the complaint -- and to be clear, this is not a red flag complaint against the FGG defendants. The Defendants took specific action, and it's alleged that they particularly tried to help BLMIS, enabled BLMIS to continue because the more assets under management with BLMIS, the more fees could be generated by the Defendant entities.

And Your Honor, the second amended complaint alleges that all of the individual defendants and their FGG partners controlled all of the FGG entities, including the Fairfield funds.

So to Mr. Strong's point about the payment of fees, FIFL and Stable were immediate transferees to assist the Defendants in getting the fees to themselves.

There were no third parties here. The money would go from BLMIS to the Fairfield funds, and then to various entities created by the Defendants to generate fees. FG Limited, and FG Bermuda, and sometimes other entities. There are exhibits attached to the second (indiscernible) to show that the Defendants, the individual defendants, owned, operated, and controlled the various FGG entities, and they ultimately received the fees that were generated by these entities.

The fact that the fee -- that money may have gone to FIFL before it went to Walter Noel or to FIFL or to -- before it went to another entity and then to other defendants doesn't change the fact that the Defendants used these entities to generate the fees for themselves.

Sorry, Your Honor. I'm just going through notes trying to catch the points that Mr. Cunha raised. I think I could move to the specific allegations.

So there's been comments that the Trustee has not

made specific allegations with respect to the individual defendants, and that is simply not the case, Your Honor. The Trustee is not group pleading or grouping the Defendants.

The second amended complaint outlines very specific allegations about each Defendant's status as an FGG insider and their specific roles within FGG. That's at Page 12 to 13 of our opposition brief and Footnote 10 of the Trustee's opposition brief.

The interesting thing about the Defendant's argument in this regard is that they created and controlled over a dozen entities all for the sole purpose of generating fees and distributing money to themselves, and now they seek to hide behind the entities that they created. The Trustee didn't create this context of multiple individual defendants acting in overlapping roles as agents, officers, directors, and even alter egos of so many entities. The Defendants created this context, and now they seek to hide behind it.

That being said, Your Honor, it is outlined in the Trustee's opposition brief, specific allegations with specific cites to the second amended complaint with particularity to give each defendant notice of the claims against them.

With respect to the first amended complaint, we really should not be talking about the first amended

complaint because it's been superseded -- sorry, Your Honor. My video is going out. It's been superseded by the second amended complaint. And the first amended complaint does not conflict with the second amended complaint. It alleges the same scheme by the Defendants using the entities that they created and control to generate over $1 billion in fees.

In fact, even the allegation -- or the argument that Defendants have raised that the allegation that FGG was used as a tradename does not conflict with the first amended complaint because in the same paragraph where the Trustee pointed out that FGG was used as a tradename, the Trustee also alleged that the profits were distributed to the individual defendant partnership percentages. So it was clear throughout the first amended complaint that FGG was considered to be an actual de facto partnership.

With respect to the relation back argument, the -- I think I've covered that, Your Honor, and it is covered in our brief. But the fact remains that where FIFL received transfers from Fairfield Century, it then paid fees to FGA to FG Limited, Walter Noel, and Jeffrey Tucker, so it's clear that the Defendants used these various entities to pay fees to themselves. And that is the common core of operative facts is the Defendant's use of these entities to benefit from and continue to enable the BLMIS scheme.

We could turn to the imputation allegations, Your

Honor. I don't know if you would like to hear that. We -- the Defendants spoke about the imputation of knowledge. The Trustee's imputation allegations are not as complicated as the Defendants purport them to be.

The second amended complaint alleges throughout that the Defendants acted in concert, that they shared -- they shared BLMIS-related information, they acted as agents for FGG and for each other, their interests were not adverse to each other, they acted as a cohesive unit.

And so the imputation among the Defendants of knowledge is not based on the existence of a partnership entity. There's no imputation up and then back down. The Defendants are alleged to have shared this information among each other in connection with operating FGG as an enterprise, that -- and they acted as agents.

So all of those arguments concerning imputation down from a partner to an individual, that's really not what's alleged. There's an agency theory. There's an officer-director theory, and there's a theory that as partners operating the enterprise, the Defendant's knowledge is imputed to (indiscernible) information with each other.

I think Ms. Bent could address now the general partnership -- the general partnership lability claims.

THE COURT: Please.

MS. BENT: Good afternoon. Almost good afternoon.

Good afternoon, Your Honor. My name is Camille Bent. I'm at Baker Hostetler representing the Trustee (indiscernible) in this matter. With regard --

THE COURT: Let me stop you. Let me stop you.

MS. BENT: Sure.

THE COURT: Your -- whatever your audio is, it's quivering.

MS. BENT: My audio? Is it better now?

THE COURT: Uh-huh. Not yet.

MS. BENT: Okay. My audio is quivering. Okay.

THE COURT: Still. Still. Still quivering.

MS. BENT: Okay. Hang on one second for me.

THE COURT: Thank you.

MS. BENT: Okay.

THE COURT: That's it. That's perfect.

MS. BENT: Is that better?

MS. THOMAS: Maybe take out your headphones?

MS. BENT: Okay. Let me take off the headphones. I thought that would be --

THE COURT: Yeah, because I think your hair is rubbing. Okay.

MS. BENT: Oh, my hair. Okay.

THE COURT: See if that worked. Pull it back and see if that works.

MS. BENT: Is that better?

THE COURT: No. It wasn't your hair.

MS. BENT: Okay. So then let me switch to the head -- the computer audio.

THE COURT: Thank you.

MS. BENT: Give me one second please. Thank you. Figure out how to switch back. Oh, I'll just turn this off.

THE COURT: You're now mute. You need to unmute yourself. Asterisk 6.

MS. BENT: Can you hear?

THE COURT: Perfect. We hear you now.

MS. BENT: Judge Morris, can you hear me now?

THE COURT: Perfect, and that's much better. Thank you.

MS. BENT: I can't hear her though.

THE COURT: Oh. I can keep talking. I'll keep talking. Your background looks great. I'm trying to talk so that you can hear. I -- say something to me when you think you can hear me. Okay.

MS. BENT: Oh, can you hear me now?

THE COURT: Perfectly.

MS. BENT: Yes. Okay. Mission 1 accomplished.

THE COURT: Okay. Yeah. Can you hear me? Can you hear me?

MS. BENT: Yes. Mission two.

THE COURT: Perfect. We're really good. We're

good. We're good to go.

MS. BENT: Okay. So today I wanted to talk to you about general partner liability. And as you know, general partners are liable for the debts -- the debts of the -- the debts of the partnership. And the Trustee in this case has sufficiently alleged facts to show that FG Bermuda and FG Limited were general partners of Greenwich Century and Greenwich Century Partners.

For Count 15 through 17, the Trustee must prove that when each of the six-year transfers were made, the respective defendant served as a general partner of the partnership, that the partnership was insolvent, and that their assets were insufficient to satisfy any judgment against them for the claims asserted.

And that's from In re LJM2 Co-Investment Limited Partnership. Okay. It's a Delaware Court of Chancellery case 2004. And the Trustee has alleged facts in the complaint to show each element.

The Trustee has alleged that Greenwich Century and Greenwich Century Partners were Delaware limited partnerships in part -- in Paragraphs 98 and 100 respectively.

And then for Count 15, we've alleged that FG Limited is a general partner of Greenwich Century. In 397, we allege that Greenwich Century was insolvent and its

assets were insufficient to satisfy any judgments. And in 397, we also allege that FG Limited is liable to satisfy any judgment against Greenwich Century.

We allege similar allegations for Count 16 in Paragraphs 400 and 401, and for Count 17 in Paragraphs 404 and 405.

We reference at this -- the Defendants argue that these counts are based on state fraudulent transfer law, and that's not the case. The applicable Delaware law that we're referring to in these counts is Section 17-403 of the Delaware code, which holds that -- which states that general partners are liable for the debts of the partnership. It specifically outlines the general partner -- general powers and liabilities of general partners, and it provides that a general partner of a limited liability -- limited partnership has the liabilities of a partner in a partnership that's governed by the Delaware Uniform Partnership Law, the persons other than the partnership and other partners.

All of that being said, the Defendant's argument that the bankruptcy code precludes the Trustee from bringing these claims is incorrect, and that's because it's not relying on state fraudulent transfer claims. What we're merely trying to do here is obtain declaratory judgment that the general partners are liable under Delaware law.

This is something that -- this support -- the decisions in Merkin and JABA Associates support this conclusion that Section 550 does not preclude a state law partnership theory of liability. Judge Lifland held that in Merkin in 2010, and as recently as March of this year, Judge Knodell reached the same result.

So the other thing that I'll add, Your Honor, is that we're not seeking double recovery. There's no disagreements about the Defendant's position in their papers that the single satisfaction rule applies. The Trustee however is entitled to recover against the general partners to the extent that he cannot recover from the partnerships themselves.

So in conclusion, that's what we're -- that's what the Trustee alleges in terms of general partnerships, and we request that the Court deny the motion to dismiss as to these counts, Your Honor.

THE COURT: Very good.

MS. BENT: Your Honor, if I may, I would also like to address the Safe Harbor issues that the Defendants raised.

THE COURT: Please.

MS. BENT: Thank you.

The Safe Harbor defense doesn't apply here because it does not protect initial transferees who have actual

knowledge. The parties actually agree that where the Trustee pleads that the initial transferees or the subsequent transfers had actual knowledge that BLMIS was not trading securities, they cannot -- they cannot receive the benefit of the Safe Harbor defense.

The actual -- what we call the actual knowledge decision in our brief is instructive because it stands for that exact proposition. Here in our case, the Trustee plausibly alleged that the initial transferees, the Fairfield funds, had actual knowledge that BLMIS was not trading securities. We allege this in Paragraphs 9, 10, (indiscernible), 320, and 321 of the complaint, of the second amended complaint.

Aside from that, we also allege that knowledge of a number of individual and entity defendants was imputed to each of the Fairfield funds. For example, for Fairfield Century, we allege in Paragraph 320 that Fairfield International Managers as manager, Fairfield Limited as investment manager of Fairfield Century, Fairfield Bermuda as investment manager of Fairfield Century, Noel as founder and director of Fairfield Century, and Tucker as founder of Fairfield Century all had knowledge that was imputed to Fairfield Century, actual knowledge.

In Paragraph 21 -- excuse me. In Paragraph 321, we do the same for Greenwich Century. We allege Noel,

Tucker, and FG Limited each as general partner of Greenwich Century had knowledge that was imputed to General Century.

We also allege that FG Bermuda as investment manager and FG advisors who provided administrative services to Greenwich Century each acknowledge that was imputed to Greenwich Century.

Last, for Greenwich Century partners, we allege that FG Bermuda as general partner, and FG advisors who provided administrative services again to Greenwich Century partners in this case had knowledge that was imputed to that partnership.

So we get very specific and particularized with the allegations of knowledge that was imputed to each of the Fairfield funds, and we also -- on top of that, we allege that the principles and the control persons for the Fairfield funds were Walter Noel and Jeffrey Tucker. We allege that in Paragraph 80. And then we allege that the agents for the Fairfield funds were FG Limited in Paragraph 152, FG advisors in Paragraph 151, and FG Bermuda in Paragraph 153.

I also want to call Your Honor's attention to the Kingate case that we reference in the -- in our opposition brief on Page 24. I want to mention that case because it's particularly instructive here as well. And it's because the founders -- in that case, you had the same thing we have

here. You had founders who were sophisticated financial professionals who had close relations -- relationships with Madoff, and they knowingly shielded Madoff and BLMIS from outside scrutiny from investors and regulators alike to protect the profits they shared.

On those facts in that case, the Court found that the Kingsgate funds "knew that Madoff was not engaging in the securities transactions he reported and that many of the entries in the statements and trade confirmations depicted -- depicted trades that could not have taken place."

Because of that knowledge, the Court held that the initial transferees were not innocent legitimate participants and that the -- that the Safe Harbor was meant to protect, and the same is true here. Again, you have sophisticated financial individuals. You have individuals that had close relationships with Madoff that were a part of Madoff's inner circle. We allege these for -- these allegations, for example, in Paragraphs 4 and 108, and in other places as well.

We also allege that our -- not our -- the individual defendants knowingly shielded Madoff and BLMIS from outside scrutiny, and we extensively make those allegations. My colleague, Ms. Thomas, went through a lot of those as it relates to Friehling & Horowitz as well as the knowledge that they had in real time with the Bayou

fraud as well as the information that they withheld from the SEC. And those are alleged at length in Paragraphs 170 to 187 and then also 188 to 218.

So in Kingate, the Court concluded that the totality of the allegations in that complaint painted a picture of individuals who knew Madoff was reporting fictitious transactions, and we believe that the same analysis applies here and that the Court should find that the SE -- that the second amended complaint has alleged facts that conclude that -- that are plausible, excuse me, that demonstrate that, you know, we have a familial relations between the Defendants who knowingly cashed in on a fraudulent scheme that was orchestrated by Madoff.

Thank you, Your Honor.

THE COURT: Thank you. Ms. Thomas?

MS. THOMAS: Thank you, Your Honor. Wow.

Is this better?

THE COURT: Much better.

MS. THOMAS: Can you hear me?

THE COURT: We thought you were -- yeah. We thought you were in the Grand Canyon for a minute.

MS. THOMAS: No. Maybe turn yours up.

THE COURT: Now speak to us and see. Can you hear me, Ms. Thomas?

MS. THOMAS: Can you hear me now?

THE COURT: Yes, I can.

MS. THOMAS: Fantastic. There were only two points that I wanted to just cover, Your Honor. This was specific cites in reference to arguments that Mr. Cunha raised.

One, he mentioned again in the context of due diligence, a trustee's theory of the case is that this was just intended to create an air of legitimacy for BLMIS to help shield from inquiry. He mentioned FG Bermuda -- they're Fairfield Greenwich Bermuda. The trustee alleges at paragraph 154 of the second amended complaint, that this entity was specifically created outside of the United States to help BLMIS avoid scrutiny of U.S. regulators.

Also with respect to the visit by PWC to BLMIS, the trustee alleges in paragraph 140 of the complaint what actually happened at that visit is that it was declared a failed mission because they were unable to verify anything concerning assets or even complete the purpose of the due diligence visit.

Your Honor, to the extent there are any other points that we didn't cover, we believe that they're covered in our opposition brief.

THE COURT: Very good. Mr. Cunha?

MR. CUNHA: Yeah, we think --

THE COURT: (indiscernible)

MR. CUNHA: -- (indiscernible) recognize a name, Your Honor. We say Mr. Qna like the letter "Q" -- Qna.

THE COURT: (indiscernible) Oh, like the letter "Q"?

MR. CUNHA: Yeah, like the letter "Q." Like "Q" and then "na," N-A. Qna.

THE COURT: Thank you. Thank you.

MR. CUNHA: Thank you, Judge. Your Honor, what's, I think, most striking about the arguments by Ms. Strong and Ms. Bent is, we challenge them in my argument to point to specific factual allegations in the second amended complaint which show actual knowledge on the part of FG defendants that Madoff was not trading securities or would show willful blindness and specifically a subjective belief that Madoff -- was a high probability Madoff was not trading securities and showing instances -- and show actions by them -- specific backed actions by them to avoid learning the truth, and they didn't point to a single factual allegation in the complaint -- in the second amended complaint -- which shows actual knowledge or which shows willful blindness. Not one.

Ms. Bent tried. She pointed Your Honor to the second amended complaint, paragraphs 9, 10, 206, 320, and 321. Well, I just reread those paragraphs, Your Honor. Paragraph 9 is completely conclusory. Paragraph 10 -- completely conclusory. Paragraph 320 -- completely

conclusory. Paragraph 321 -- completely conclusory. Only one of those paragraphs has anything in it that actually cites the -- states the facts and that fact that's state is this. When Fairfield Greenwich did its diligence with respect to F&H -- Friehling and Horowitz, the auditor -- and they called Mr. DiPascali -- at a certain point -- they called him twice -- at a certain point, Mr. DiPascali said he could not provide any additional information on F&H.

So nothing about this points to actual knowledge on the part of anyone at Fairfield Greenwich. What it points to is Fairfield Greenwich doing diligence and at a certain point they've learned all that they could because Mr. DiPascali who is the guy at Madoff that they contacted -- the insider at BLMIS that they contacted -- couldn't tell them anymore. So again, nothing. They utterly failed -- utterly failed. I challenged to point to actual factual allegations in the complaint which show actual knowledge or would show willful blindness.

You know, they claim again -- and I told you -- this to Your Honor. I made this point to Your Honor in my initial presentation. All of this elaborate due diligence that was done by the Fairfield Greenwich entities -- which they admit -- both internal and external, that this is performative, that this was just a show for the investors. First we say that's completely improbable. But second, it

does not address, and they do not even try to address, the internal communications at FG and the communications between Mr. Vijayvergiya in particular at Fairfield Greenwich and Mr. Madoff which show that the Fairfield Greenwich people thought Madoff was trading securities. Nothing performative about those communications for the investors. Not disclosed to the investors. It couldn't help them attract other investors. These are internal communications or communications with Madoff. They had no answers to that whatsoever. And those communications show, Your Honor, that the Fairfield Greenwich people thought Madoff was trading securities.

Interestingly enough, the exhibits to the first amended complaint are completely dropped from the second amended complaint. Second, interestingly enough, they actually continue to quote from those exhibits in the second amended complaint, but they don't reference what documents they're quoting from and they no longer attach the exhibits. Hmm. Why is that? It's very obvious why it is. When you look at the exhibits, they overwhelmingly show that the Fairfield Greenwich defendants thought Madoff was trading securities, hence they dropped them from the second amended complaint in an effort to, frankly, pull the wool over the eyes of the Court in an effort to meet a pleading burden because they knew that their own exhibits that they pulled -

- that they think are important to this case -- important enough to attach to and incorporate by reference into their first amended complaint -- their own exhibits prove that the -- establish -- that the Fairfield Greenwich defendants, by their own exhibits, did not have actual knowledge that Madoff was not trading securities, but in fact, they thought Madoff was trading securities throughout the exhibits.

They make a reference to this jail comment that someone made to Fairfield. If you actually look at the allegation, there's no context for it. The individual who made that comment, he doesn't say why he thinks this would happen. He doesn't say anything about Madoff being a fraud. He seems to be commenting on some aspect of something that was going on at Fairfield Greenwich. Not that Madoff was a fraud, not that they knew that Madoff was a fraud, not that they believed that Madoff was a fraud and there's no reference to that whatsoever. Frankly, it's mudslinging, Your Honor. It has nothing to do with the standard here.

By the way, we are gratified that Ms. Bent agrees that the safe harbor is in play here -- 546(e). We're gratified that Ms. Bent has agreed and conceded that actual knowledge must be established by the factual allegations in the pleading and we say that they have utterly failed to do that.

They say that the first amended complaint has been

superseded. Yes, it has. There's a second amended complaint, but the authorities that we point Your Honor to indicate that prior pleading can and should be taken into account in deciding a motion to dismiss because statements in prior pleadings and exhibits to them -- documents incorporated by reference -- count as admissions in due course. They have no answer for that.

By the way, Your Honor, we're here on a motion to dismiss the second amended complaint. We could just as easily be here on a motion by the trustee for leave to file the second amended complaint, and in that event, of course the operative pleading would be the first amended complaint and that's the -- and we would be focusing on that. We're only here on a motion to dismiss because it seems cleaner to the trustee and to us to proceed on a motion to allow them to file the second amended complaint and then make a motion to file the second amended complaint, rather than say, "No, you can't file the second amended complaint. You've got to -- we're going to say it's futile because you don't state a claim for actual knowledge or for willful blindness." And so it can't be because of this procedural difference in how we decided to proceed, but, Your Honor, it's forbidden from looking at a prior pleading and forbidden from looking at the exhibits to that prior pleading. In any event, Your Honor, the main point here is that the authorities we have

cited to Your Honor -- and they're clear -- have said you do look at prior pleadings and they're treated as admissions in due course.

They mentioned the Kingate case, Your Honor. Kingate is a case that we think is helpful and the reason is this. In Kingate, the court found -- this court, Judge Bernstein -- found, hmm, the plaintiff has met -- the trustee has met its pleading burden of at least pleading facts which could at least be claimed to show actual knowledge that Madoff wasn't trading securities, that Madoff was a fraud. Why? Why does the Court find that? Well, the main reason is it finds it is because the head of operational due diligence at Kingate reported to his superior -- so this is their Amit Vijayvergiya, if you will -- reported to his superiors that BLMIS was a scam. So they had actual knowledge from their guy responsible for investigating Madoff that Madoff was a scam, that he was a fraud.

There's nothing like that in this record here. Nothing like that whatsoever. Mr. Vijayvergiya never makes that conclusion. There's no allegation he makes that conclusion. There's no allegation that he makes any such report to anybody at Fairfield Greenwich. To the contrary, all of his reports go to operational matters at Madoff, basically, based on his view -- his understanding -- that

Madoff was trading securities. So that is a massive, massive difference between the Kingate case and this case.

Second massive difference. And that's, in this case, Grosso, one of the senior people at Kingate -- he met with Madoff on the 17th floor. The 17th floor is where Madoff conducted the investment advisory business of BLMIS. He did not admit many people at all -- hardly anyone -- to the 17th floor and some of the cases we've cited to Your Honor make this point. So to be admitted to the 17th floor is to be admitted into Madoff's inner sanctum because that's where the fraud was taking place.

There is no allegation in the complaint here, Your Honor, that anybody at Fairfield Greenwich, any defendant here or anybody associated with a Fairfield Greenwich entity, was admitted to the 17th floor or allowed onto the 17th floor. And it seems trivial, Your Honor, but it's actually rather -- the courts have found it important and it is important because, again, Madoff had legitimate trading operations going on on other floors. Madoff was a major market maker on Wall Street. He had legitimate businesses that he was running on other floors. The investment advisory business was on the 17th floor and Kingate people were given access to that floor where all the fraud was taking place. No allegations that FG was. So those are two very, very crucial -- crucial differences between that case

and this case.

I put the Court to the Merkin case also. Merkin -- again, feeder funds that invested in BLMIS on behalf of its investors -- and there the court found that the trustee had not stated a case for actual knowledge, that he hadn't stated facts which made it plausible that the Merkin fund had actual knowledge that Madoff was a fraud. But they did find that they'd stated -- just enough -- that they'd stated enough to say to state a willful blindness case, that they thought a high probability Madoff's not trading.

But why? Why did they find willful blindness but they didn't actual knowledge? And the reason is because one of the portfolio managers for Merkin -- so one of their folks who actually, you know, ran a book -- a portfolio book for investors at Merkin -- actually told Mr. Merkin, the head of Merkin, that he thought Madoff could be a Ponzi scheme. So here's Merkin with actual -- here's Merkin being told Madoff could be a Ponzi scheme. We've got nothing like that here. We have nothing on the record here with any internal person at Fairfield Greenwich reporting to anybody else at Fairfield Greenwich that they thought Madoff could be a Ponzi scheme. Zero. And they've had massive discovery, Your Honor. It just doesn't exist.

So -- but the Court says, "Hm. Could be a Ponzi scheme." Well, that's not actual knowledge. It's not

enough for actual knowledge. Even being told, "Hey, Madoff could be a Ponzi scheme." That's not enough for actual knowledge but it is enough for willful blindness. But we don't have that here. So here, we don't even have -- we don't have willful blindness either.

They also have an investor summarizing a meeting with Merkin and the investor -- what the investor took away from his meeting with Merkin is, there seems to be some probability in (indiscernible) mind that this -- meaning BLMIS -- could be a fraud. So the Court said, "Look, well, looking at that, okay. Fine. They've pled enough for subjective belief in a probability -- high probability -- that Madoff could be a fraud on the part of Merkin, but not enough to say he actually knew beyond a doubt. So no actual knowledge but there is willful blindness." But again, we -- there's nothing like that in our records. There's nothing whatsoever that they plead which shows that anybody at Fairfield Greenwich thought in their mind that Madoff could be a Ponzi scheme, that Madoff could be a fraud, or that Madoff wasn't trading securities. Nothing at all in the record.

Your Honor, I'll just -- I'll end there. I think that's enough. The main point is -- I think, Your Honor, the main takeaway is, we challenged them to point to specific allegations of fact that show actual knowledge or

belief that a high probability that Madoff was not trading securities. They've utterly failed to do so and that's because they've utterly failed to do so in their pleadings. They agree that the actual knowledge standard applies. They agree that the willful blindness standard applies. Their pleadings have not established it, have not even come close to establishing it. Their pleadings have actually done the opposite and show -- you know, beyond doubt -- show beyond doubt in all of them, consistent to all the documents, that the folks at Fairfield Greenwich thought Madoff was trading securities. And for that reason, Your Honor, you must dismiss all of the subsequent transfer claims under the standards that they themselves conceded apply here. Thank you, Your Honor.

THE COURT: Does anyone else wish to be heard? Yes.

MS. BENT: Your Honor, may I make on more quick point?

THE COURT: Yes.

MS. BENT: Thank you, Your Honor. Very quickly, I just wanted to point you to page 13 of our opposition brief -- in footnote 10 and that's in section 2 of our opposition brief. Footnote 10, we extensively point to specific allegations and have broken down by defendants as to what they knew in our brief.

The other very quick point I want to make is that the dispute that you heard about in the allegations -- the varying stories that you've heard about whether the defendants had knowledge that BLMIS is trading securities is exactly why we are entitled to discovery. It's an issue of fact and it's not appropriate to weigh one theory of what happened over the other. The complaint on its face states a plausible claim that the defendants actually knew that BLMIS was trading securities and any issue of fact entitles us to discovery. Thank you, Your Honor.

THE COURT: Very good.

MR. CUNHA: Your Honor, just one counter to that. Again, we're not asking Your Honor to make findings of fact here. We're not -- it's not an evidentiary case. It's on the pleadings, but we will say that Ms. Bent is completely wrong about what the burden is here and what the Court needs to do. The cases are very, very clear that what decides these motions and what the Court is required to do on these motions is look at the well-pled factual allegations and make a determination whether in the Court's judgment, using the Court's common sense, whether those allegations establish that the plaintiffs actually knew that there was no trading at Madoff or believed in a high probability that there was no trading at Madoff.

We're not asking for a factual finding here, Your

Honor. We're asking for -- whether the facts as pled make a plausible case for actual knowledge of willful blindness. That's what required under the Iqbal Twombley standard and it is not something that goes to discovery. It not something that goes to summary judgment. It goes at the motion to dismiss stage which is what Iqbal and Twombley were concerned with and if you look at every single case that we've cited and that they've cited, that's what the courts do. They look at the factual allegations in the complaint -- not the conclusory claims, not the conclusory charges -- the factual allegations in the complaint and the courts make a decision, are those facts sufficient to make a plausible case that there was actual knowledge -- they had actual knowledge that -- actual knowledge -- subjective knowledge -- that Madoff was not trading or a belief in high probability that Madoff was not trading.

And so, respectfully, Ms. Bent is wrong and it's exactly what the Court is required to do on this motion is to look at those factual allegations and the -- and in the material attached to the complaint and to see whether they have met that burden of pleading a plausible case of actual knowledge or willful blindness. We submit, Your Honor, that the factual allegations -- and we've pointed them out in great detail -- the factual allegations amount to a clear picture -- a clear understanding -- that whatever else they

understood, the Madoff defendants clearly believed that Madoff was trading securities, and therefore, these claims must fail. Thank you, Your Honor.

THE COURT: Thank you. Yes. Anyone else?

MR. STRONG: Yes. Your Honor, Fletcher Strong from Wollmuth Maher & Deutsch. I'd like to respond briefly to trustee's counsel's response to my statute of limitations argument. I found Ms. Thomas and Ms. Bent's presentation very interesting in that it did clarify the entire basis for their relation back argument is that the payment of performance and management fees satisfies the underlying standard.

This argument clearly fails here in the rule 15 analysis because taking a step back, rule 15 requires adequate notice of both facts surrounding the claims as well the parties to support overturning a statute of limitations. Remember, rule 15 allows litigants that fail to properly file claims in accordance with the applicable statute of limitations in time. So because of that, I think they are conflating somewhat. It appears that they're conflating the potential imputation arguments that are relevant for the knowledge analysis with the relation back analysis for purposes of rule 15.

But even if their argument was correct that the payment of performance and management fees were relevant,

the BNP case by Judge Bernstein has held that for subsequent transfers the relevant inquiry is whether the conduct of the defendant led to the stripping of assets from BLMIS. Here, the payment of performance and management fees did not strip BLMIS of any assets. The fees were specifically paid from, as alleged in the complaint, from the assets of (indiscernible), so even if -- taking them at face value that the payment of fees is relevant, it doesn't satisfy the requirement that payment of fees strip BMLIS itself of assets.

THE COURT: Very good.

MR. STRONG: Thank you, Your Honor.

MS. EICHENBERGER: Your Honor, if I may take a moment to respond to the trustee's points regarding imputation and general partnership. I will make it very short.

THE COURT: Thank you.

MS. EICHENBERGER: So we heard from the trustee's counsel that they believe that -- what they've alleged is that there was shared knowledge because all of the defendants were officers, directors, and (indiscernible) partners of the shared ecosystem. Not only is this an oversimplification but their reliance on shared knowledge is, at its core, just another way of saying that they can rely on constructive knowledge.

But that's not the standard here. We all agree that there is an obligation on the trustee to plead direct and clear knowledge that BLMIS was not trading securities, and you can't rely on concepts of shared knowledge or imputed knowledge to meet that high burden.

Second, with respect to the trustee's general partnership argument, the trustees continue to ignore the second circuit's analysis in Tribune and reiterates their framing of their claims in count 15 through 17 as general partnership claims. But Tribune instructs that you need to look at the underlying nature of the claims alleged. And here, the trustee's general partnership claims are really just avoidance claims masquerading as general partnership claims, and those claims, as we have said, are preempted by the federal bankruptcy code. And the trustee's reliance on the Merkin and Jabba Associates cases doesn't change the analysis. Merkin was decided many years ago and certainly well before the second circuit's decision in Tribune and doesn't engage in any substantial analysis of the preemption arguments that we have made. Jabba Associates merely cites Merkin, and again, does not engage with Tribune or with any of the substantial preemption arguments they have made today. And therefore, we submit that those cases are not findings on this Court.

So unless Your Honor has any questions, I will

yield the floor.

THE COURT: I do not. Ms. Thomas, you wish to add anything? Ms. Bent, you wish to add anything?

MS. STRONG: No, Your Honor. Thank you.

THE COURT: Ms. Bent?

MS. BENT: No.

THE COURT: Very good. I will issue a written opinion.

MS. BENT: Thank you, Your Honor.

THE COURT: Thank you very much. Thank you for your time. Thank you for your well-articulated arguments.

MS. STONG: Your Honor, I have one administrative question. We're actually on the calendar, I believe, for a pre-trial conference. I don't know if that was in error. In other words, in addition to the hearing.

THE COURT: On -- for today on the pre-trial conference on this matter?

MS. STRONG: Right. I think it was an error.

THE COURT: It's an error. We will do that at a later date.

MS. STRONG: Thank you, Your Honor.

MR. CUNHA: Your Honor, I'd just like to thank you for giving us so much --

THE COURT: It's not -- excuse me -- it's not an error. It's just that we will do it at a later date after I

do the opinion. Yes, sir, Mr. Cunha.

MR. CUNHA: Your Honor, I'd just like to -- on behalf of my clients, Your Honor, I'd just like to thank you for listening so carefully and giving us so much time today. After 12 years, I'm sure they're gratified to have an opportunity to get before Your Honor and see how much care and attention Your Honor's giving so thank you. Thank the Court.

THE COURT: Thank you. I can tell you I also credit my staff and all we've done to really pay attention to this matter. We've spent quite a bit of time getting ourselves up to date on everything in this case. So it's wonderful.

MR. CUNHA: Thanks again, Your Honor. We -- all of us here at -- certainly my colleagues at Simpson Thatcher, my colleagues on the defense side, certainly my clients deeply appreciate it.

THE COURT: Very good. Thank you. Now then moving on to the next matter and everyone has been very, very patient and I have learned a lesson today. We will only set these up separately so we can have a break in between. This is a lot of summary judgment argument in one day when we've started at the hour we started at.

Let me ask the parties that are dealing with this right now if we think we should take another break before we

begin argument on -- I will just say the Miller matter so that everyone knows where we are.

MS. TURNER: Your Honor, Tara Turner of Baker Hostettler on behalf of the trustee Irving Picard. I defer to you if you feel that we should take a break, but I'm ready to proceed as soon as possible.

THE COURT: Well, let me ask everyone else because everyone else is in the same position I've been in and that is sitting here listening with water. That's what I've had, water. Or do we need to take just a break to give everybody a chance to do what they need to do after they've sat for a long period of time and have maybe a snack? Let me hear from others then. You're on mute.

WOMAN 1: Can you hear me now?

THE COURT: Perfectly. Thank you.

WOMAN 1: I would love a break.

THE COURT: Okay. You've said it. That's it. All we needed was one person to say it and if one person says it, we're going to do it. So we will take -- let's take a 25-minutes break. That gives everybody a chance to go do what they need to do -- or 30 minutes. We'll make it an even 30 minutes.

WOMAN 1: Thank you.

THE COURT: And then we'll come back at 5 after 1:00.

WOMAN 1: Thank you.

(A short break was taken)

THE COURT: Great. We are now on the adversary proceeding 10-04921 in the matter of the Securities Investment Protection Corporation versus Stanley T. Miller. And it's Irving Picard trustee for the substantially consolidated SIPC liquidation of Bernie L. Madoff Investment Security, LLC, and Bernie L. Madoff. Very good. State your name and affiliation.

MS. TURNER: Good afternoon, Your Honor. Tara Turner of Baker Hostettler on behalf of the trustee Irving Picard.

MS. NEVILLE: Carol Neville from Dentons on behalf of Stanley Miller and with me on the phone is Art Ruegger.

MR. HALLENBECK: Good afternoon, Your Honor. Nicolas Hallenbeck on behalf of the Securities Investor Protection Corporation.

THE COURT: Excellent. Anyone else wants to put their name on the record?

MR. CREMONA: Good afternoon, Your Honor. Nicholas Cremona also of Baker Hostettler on behalf of the trustee.

THE COURT: I believe this is a -- this one is a summary judgment. Correct?

MS. TURNER: That's correct, Your Honor.

THE COURT: And I believe it's cross summary judgments. Correct?

MS. NEVILLE: That's correct, Your Honor.

THE COURT: Ms. Turner, I believe you are arguing for the trustee.

MS. TURNER: Correct. Thank you, Your Honor.

THE COURT: Very good.

MS. TURNER: We are here today on the trustee's motion for summary judgment and defendant's cross motion for summary judgment. Despite defendant's best efforts to ignore the prior decisions in this liquidation, the simple fact is that there are no remaining issues of fact in dispute in this adversary proceeding.

Defendant's arguments have been rejected by this court and the district court no less than five times. Your Honor is well versed in the elements of the trustee's claims so I'm going to move through those quickly. First, there's no dispute that defendant received the two-year transfers of fictitious profits within two years of the petition date. Second, this court has already held that the trustee can rely on the Ponzi scheme presumption, most recently in Your Honor's Epstein opinion, therefore, it is law of the case in this liquidation. Even if it weren't, the trustee's experts confirm that BLMIS was a Ponzi scheme and that BLMIS employees substantiated those findings through their plea

allocutions and testimony. Defendant offers no evidence or expert testimony to rebut the trustee's proofs.

As to the trustee's final element -- whether the transfers were of an interest of the debtor in property -- this Court and the district court have sounded rejected defendant's argument that the IA business was held by Madoff personally or as part of his sole proprietorship. Based on the same documents that were presented in the trustee's motion for summary judgment in Epstein, including the Form BDs and that BLMIS articles of incorporation, this Court found that BLMIS was the owner of the JPMorgan accounts because Madoff transferred ownership of all assets of the sole proprietorship, including the IA business in the Chase accounts to the LLC, as of January 1, 2001.

Despite these five decisions in the Trustee's favor on this issue, Defendant refashions the same arguments already rejected by this Court, including that certain BLMIS records are inadmissible and unreliable, that the Trustee's expert, Mr. Dubinsky, is unqualified, and that the name on the BLMIS checks is dispositive of the bank account ownership issue. But again, this Court has already found that the BLMIS books and records are admissible and trustworthy, and that Mr. Dubinsky is qualified as an expert on this issue. The Court relied on both in Epstein, when it found that all assets were transferred from the sole

proprietorship to BLMIS. Again, Defendant has presented no admissible evidence to rebut Mr. Dubinsky, nor did Defendant depose Mr. Dubinsky.

In addition to the elements of the Trustee's claim, the Trustee is also entitled to pre-judgement interest, consistent with the law of the case in this liquidation. Pre-judgement interest is necessary to compensate fully the BLMIS estate for the loss of customer property while it was in Defendant's hands for over 12 years. This Court awarded pre-judgement interest at a rate of 4 percent in Epstein and Mann. Interest is similarly appropriate here, because Defendant is represented by the same Counsel as Defendant in Mann, yet refuses to acknowledge law of the case. Instead, he's continued to delay judgement, including prolonging discovery and mediation.

Further, this Court previously stated that the accrual date for pre-judgement interest is the filing date, as the claims asserted by the Trustee arose only upon the filing of the SIPA liquidation. So the Trustee submits that interest should be applied in this case from the filing date, until the date judgement is entered.

Finally, Defendant argues that he has affirmative defenses that overcome the Trustee's claims, including that federal and New York law exempt his assets from judgement.

But these exemptions, if they apply at all -- which the Trustee believes they do not -- apply to collection of a judgement, not the Trustee's avoidance claims. This Court and the District Court previously rejected these same arguments based on ERISA in New York law, finding that neither overcomes the Trustee's avoidance claims. In any event, fraudulent transfers made as additions to Defendant's IRA would fall in New York's statute exception to the exemption. Despite Defendant's arguments that a judgement here would strip Defendant of his retirement benefits protected under New York law, Defendant ignores that the fictitious profits transferred to him were actually other customers' money in the first instance.

Defendant also argues that he is a subsequent transferee, and his IRA custodian is the initial transferee. However, Defendants in Nelson raised the same issue before Judge Bernstein, and he held as a matter of law that the IRA custodian is a mere conduit. He found that the initial transferee, here the Defendant, is the first to acquire dominion and control over the assets. The IRA custodian in Nelson is the same here. Further, the Trustee's expert analyzed the IRA account statements and confirmed that the transfers were IRA or same-day distributions. As such, Defendant is the initial transferee and cannot rely on Section 550(b)'s value defense.

Finally, in his opposition, Defendant argues that if the IA business and JPMorgan accounts were transferred to the LLC in 2001, then the Trustee improperly calculated Defendant's avoidance liability. Defendant effectively asks for credit for the fictitious securities listed in his account as of December 31, 2000, in addition to deposits made between January 1, 2001 and BLMIS's collapse, while deducting withdrawals made during the same period, ignoring that Defendant improperly credits himself for fictitious profits on the customer statement. If the Trustee only gave credit to Defendant's deposit and withdrawals after the LLC was created, Defendant's avoidance liability would increase to over $4 million. In any event, this Court has already determined that the change to the LLC has no impact on the Trustee's net investment method.

For the foregoing reasons, the Trustee's motion should be granted, and Defendant's cross-motion should be denied in its entirety. Thank you.

THE COURT: Very good. Does anyone wish to add to the Trustee's argument for the summary judgment?

MR. HALLENBECK: Just briefly, Your Honor. Nicholas Hallenbeck on behalf of Securities Investor Protection Corporation. I just wanted to point out one factor that may not be readily apparent from the briefs filed in this case but is on the record.

If you look at the Statement of Material Fact Number 12, it indicates that the -- and this goes to the Defendant's argument that the SEC public records -- or that the -- I'm sorry. This goes to the Defendant's argument that the 2001 SEC form, by not checking the box for the independent advisory services box, that the IA firm continued on a separate path, along with the sole proprietorship. But, Your Honor, that's not necessarily the case, because in 2001, Madoff did not have a registered investment advisory business to report to the SEC. Madoff did not register the investment advisory business until August of 2006, and that's in Statement of Fact -- Statement of Material Fact Number 12.

The Trustee stated in 2006, BLMS registered as an investment advisor. And then, although the Defendants say that they disputed that fact, in the reply -- in the text of the reply they said, in August 2006, Madoff registered the IA business with the SEC.

So, Your Honor, that fact is important because it indicates that this occurred before the two-year transfers at issue here. They were from approximately December 2006 to December 2008, and so just wanted to point that out for Your Honor.

THE COURT: Very good. Anyone else in support? Very good. Ms. Neville, then, I -- if you would please

rebut first the Trustee's summary judgment, and then launch into your counter summary judgment.

MS. NEVILLE: Fine, Your Honor. Can you hear me? I'm always --

THE COURT: Perfectly.

MS. NEVILLE: -- confused about whether I'm muting or unmuting.

THE COURT: Truly, I relate. Okay, go ahead.

MS. NEVILLE: I know that these cases have been argued again and again. However, I would like to point out that the Trustee does not have a single expert on the issue of banking, banking practices, corporate matters, or securities matters. They have three experts, all of which are forensic accountants. And through those experts, the Trustee is trying to put in the evidence that there was a corporate transaction.

I'm confused about Mr. Hallenbeck's last argument. Is he implying that there was no investment advisory business before 2006? That would be nonsense. Clearly, there was an investment advisory business when Madoff registered the other two businesses in 2001, and he did not check the investment advisory business.

I think it's pretty clear from the actual -- the actual operation of the investment advisory business that it was kept completely separate from the proprietary trading

business and the market making business. It had different employees, it had different customers, it had different bank accounts, it had different sources of funds. If you rely on the BD report from 2001 to say that all assets were transferred, you're relying on the SEC filing, which was patently false. In fact, both Peter and Bernie Madoff were convicted of false statements on their securities filings, and those are the main pieces of evidence on which the Trustee relies.

I truly don't think that this is the issue for this case. Your Honor has made a decision about the language of SIPC as bringing in customer money applying to any money that was held in the 703 and 509 accounts. I don't think that they ever belonged to the Debtor. I don't think the customers ever belonged to the Debtor. But I think my cross-motion really obviates the needs to have a fight about this again.

I'd like to make two points. In Epstein, Your Honor actually ordered pre-judgement interest from the date of the filing of the Epstein adversary. In Mann, it was ordered from the date of the BLMIS adversary. Those are two different dates, and it makes a big difference in the calculation of interest.

I do have an argument about pre-judgement interest in this case, which I think is really important. This is a

man who is 89 years old and has Alzheimer's. He has no funds to meet the judgement, let alone the judgement with interest, so I'm very curious to know why both SIPC, whose interest is in protecting customers, and the Trustee are so adamant about pursuing pre-judgement interest against this man, let alone the judgement. I mean, this is a case where it shouldn't have gone forward in the first place. I'm basically doing it on a pro bono basis because I find it so offensive that this man is being pursued. His assets are exempt, he doesn't have much assets, and he's sick.

Mr. Cremona read out 386 other possible Defendants under a hardship case. No one was prosecuted who had less than $500,000 in a transfer. There are lots of other examples of people being let out, so the prosecution of this particular Defendant is really offensive.

I'd like to address the cross-motion now, because I think it's really important. A lot of my arguments have been totally misrepresented.

THE COURT: Okay.

MS. NEVILLE: It is a absolute principle in New York that there is a connection between the inability of a Trustee to collect on assets because of legal protection or exemption and the right to avoid a transfer. I cited three or four cases in my brief, the first of which being the Bear Stearns versus Gredd case, which relies on a U.S. Supreme

Court Begier versus IRS. Mr. Cremona and Ms. Turner, now, have ignored the fact that this is a principle in New York. It may be a minority view, but it is an absolute principle. If you can't collect on the asset, you can't bring an avoidance action. My brief has three or four cases, all of which show that in that instance, the Trustee was barred by the defense of a legal protection or exemption from pursuing the action.

Now the question comes, is this asset exempt? There is no question, under New York law, that this asset, which was an individual retirement account, is exempt. There's not one statute, there are two statutes. One is the CPLR, but even before that is the trust and estates, the EPTL 7-3.1, which defines an individual retirement account as a spendthrift account. It changes the notion of what that account is from a self-settled trust to a -- almost an irrevocable trust set up by a third party. Absolutely, that's what it does.

The same language appears in the CPLR 5205, which is an execution statute, and both have an exemption. The way the statute works is the asset and the distributions from it, in two parts, are exempt from the claims of creditors, except for the time when the settler of that trust, or IRA, puts money into the account to conceal it from their own creditors. Every single case that has

interpreted these two statutes has interpreted it that way. The idea that a third party could come in and say the money that went into that trust was a fraudulent transfer undermines the entire protection, which is set up by the statute.

Ms. Turner points out that there is an exclusion, and that exclusion is for a fraudulent transfer. And as I just pointed out, the language there is not 100 percent clear, but it certainly doesn't apply to transfers from BLMIS. First of all, it only applies in cases under Article 10 of the DCL. The Trustee does not have a claim under the DCL.

Earlier in the same statute, when the -- when the legislator wanted to refer to the Bankruptcy Code, it expressly did. Let me pull this up so I can cite it for you exactly. I think it's in (c)(3) of the CPLR 5205. It says that all trusts and the assets from there shall be conclusively presumed to be spendthrift trust under this section, under the common law of the state of New York for all purposes, including but not limited to all cases arising in cases under Section 100 -- 113 of Title 11 of the United States (indiscernible) Code, as amended. That's one provision, one subsection of the exclusion that refers only to DCL. So the exemption, on its face, doesn't apply to an avoidance under 548(a)(1)(a), which is all the Trustee has

here.

In addition, that particular section refers only to additions. And it is quite clear in all of the case law addressing that exemption that it only applies to actual exemptions, i.e., deposits. It doesn't apply to income. Because what you have in the following section, in D, is distributions which are income, or profits, and that's a completely different section. So additions means only additions. The only actual additions to that account are Mr. Millers' $4 million-plus of deposits into that account.

What is not discussed is D, which is the income exemptions, and it says that property from that individual retirement account is exempt from execution by creditors, or any kind of recovery from creditors, if the principal is exempt. Well, the principal of that account is Mr. Miller's deposits, and those are exempt from fraudulent transfer actions. And in this case, it's 100 percent --

THE COURT: Excuse me. Just let me get -- let me get a fact clear in my own mind, Ms. Neville, just one fact I want to be clear on. Has he not received all the principal back?

MS. NEVILLE: Yes. Yes, Your Honor, he has.

THE COURT: Okay. Okay. That's all. I just wanted to be clear on that. I thought that's what I'd read.

MS. NEVILLE: Yes. No, of course, he has. But

the question I have is whether or not the transfers which were made, which includes some of those principals, are avoidable, and the answer is, no, because they are exempt.

I want to get to the cases that have discussed this. The first one --

THE COURT: Well, just so -- I want to be clear. I want you discussing the Bernstein opinion and the Rakoff opinion.

MS. NEVILLE: Exactly.

THE COURT: Okay.

MS. NEVILLE: I think Judge Rakoff's opinion came first. It was on a motion to dismiss, and the argument there, which I actually was one of the people making the argument, was that because people had to take out money from their individual retirement accounts, it shouldn't be counted as a fraudulent transfer, and Judge Rakoff denied that. And in a footnote, he tried to address the question of whether or not the exemption applied.

There was no factual or legal discussion in the briefing on that particular matter. And he actually -- he actually tosses away the Section D exemption for income distributions and says, basically, that it wouldn't apply here. But on its face, it applies because it's from a trust, the principal of which is exempt. And the principal is, as the Trustee says in his actual statement of facts, is

exempt because the principal is the money that was put in by Mr. Miller.

Judge Bernstein then, also on a motion to dismiss, raised four separate issues. I'll address them one at a time. The first one was, we didn't tie the fact that you couldn't execute on the asset to the viability of a fraudulent transfer. And what I've just said earlier is that that's the principle under New York law which says that if you can't get it, then you can't avoid it. So, on the first point, the answer to that is, there is a connection between the ability to collect and the ability to avoid.

The second is, he said, the exemption doesn't apply to all trusts, which was true, because this was a motion to dismiss that had 50 or 80 participants, and not everybody had an individual retirement account. There is no dispute that it absolutely does apply to individual retirement accounts.

The third thing he says is that CPLR 5205 addresses the situation where the Debtor and the Trust are different entities, and the Plaintiff seeks to satisfy its judgement against the judgement Debtor from the trust. Here, the trust of the retirement received the fraudulent transfer. We agree. It went first to a trust, which was a spendthrift trust.

Fourth, even if the principal is exempt, the

income earned may not be fully exempt. Well, under 5205(d)(1), the 90 percent qualification on the exemption is inapplicable to individual retirement accounts. So all of the issues that are raised by Judge Bernstein I think I can address, or I have addressed, at great length in the briefs.

Then we get to the question of whether or not there's a subsequent transferee, and Ms. Turner said, well, look at Nelson. Well, I don't have the factual development in Nelson that I have laid out for you in this case. What Fiserv did -- now, you remember, Fiserv was the appointed agent, custodian trustee for all of Madoff's individual retirement accounts. There must have been 100 or more. And early on in the case, many people brought an action against Fiserv Retirement Accounts. It had 20 different names, but they were all the same entity.

Their agreement about law suits on a fraudulent case like this is pretty air tight. It would have been hard, at the early stages of this case, to bring Fiserv into the picture, and it was dismissed, even by the Trustee, without prejudice early on.

But what I have seen in this case and in several of the others that I have, because I had other individual retirement accounts, is that Fiserv held onto the money for an extremely lengthy period of time. And one of my other clients pointed this out, that he got very frustrated

because he would make a request to Fiserv for a withdrawal and it would take weeks to get it. And then, when I would look at the dates on the checks, you would see that the checks went earlier to Fiserv.

So what I have shown, and what I can continue to show, is that Fiserv would make a request to -- well, the beneficiary would make a request to Fiserv for money. Fiserv would make a request to BLMIS or Madoff Securities, whoever. Mostly, they're addressed to Bernie Madoff, exactly. All of the requests are addressed to Bernie Madoff, as a matter of fact. And then, the money would come to retirement accounts. Every check in this case went to retirement accounts, every single check. There's no check to Mr. Miller, and the Trustee doesn't have a single check to Mr. Miller, because they all went from retirement accounts to Mr. Miller.

But the dates on the check, which are the dates in the Trustee's complaint, are all the dates that the checks were sent to Fiserv. They're not the dates that then Fiserv passed them on. So Fiserv held on to those checks for a week, 10 days, two weeks. And it's a very tedious process to figure this out. You have to take the date of the check. You have to take the quarterly reports that Fiserv sent. You have to show when Fiserv reports that it got the check. Then you have to see when the check was sent out or the

distribution was made to Mr. Miller. And for many years, the dates were a week to 10 days, two weeks later. So Fiserv had the money to float, not only on this account, but on 100 accounts.

There were anomalies here. First of all, 2006 was a year when there was only one distribution made, and it was made on the same day. I don't know why. I mean, I didn't have -- you can't ask Mr. Miller any of this stuff about the account. Two thousand seven was an anomaly as well. First of all, $1 million came out and went to another Madoff fund-of-funds investment, Austin Capital. And there were other distributions of an extraordinary size, $300,000, whatever. Those were made on the same day, so they're hard to compare to the process that Fiserv used throughout the entire account. But not a single request was ever made by Mr. Miller directly to Bernie Madoff. Not a single check was ever paid directly to Mr. Miller from BLMIS, Madoff Securities, Bernie Madoff, or anybody. They all came from Fiserv throughout the entire history of this account.

We get to the question, then, of whether -- oh, I want to point out one more thing.

THE COURT: Let me just ask one -- let me interrupt and ask one question. The record shows that between $50,000 to $60,000 a month was taken out. Did that go to Mr. Miller?

MS. NEVILLE: After it went to retirement accounts, it did.

THE COURT: I understand, but you're saying Mr. Miller didn't have the $1 million, Mr. Miller didn't have the other amount, but he did have the $50,000 to $60,000 a month.

MS. NEVILLE: Yeah. I'm not making a point, though, Your Honor, about necessarily where the --

THE COURT: That's a point I want made.

MS. NEVILLE: Okay. Okay. For me, it was the timing, because the --

THE COURT: Answer my question first.

MS. NEVILLE: Oh, I --

THE COURT: Then you can put timing in all you want to. But I want to know if this ended up in Mr. Miller's account.

MS. NEVILLE: The $60,000 did end up in Mr. Miller's account. I mean, I don't have the checks to show you that, but I assume it did.

Now, I would like to point out that there were --

THE COURT: I know you're arguing the subsequent initial transfer.

MS. NEVILLE: Yes.

THE COURT: But you haven't looked at your client's bank accounts to see that these came in to him?

MS. NEVILLE: Your Honor, there are several things about that. It's 12 years since these cases were started.

THE COURT: Okay.

MS. NEVILLE: By the time they were actually started -- I have 35 clients. Many of my clients did not retain the documentation that you would -- we would all have loved to have. I mean, even the Fiserv documents that we got on discovery in 2015 were incomplete. There was not, in most clients' cases, a retention of documents like bank checks.

THE COURT: Okay. I was just -- that's fine. That's all.

MS. NEVILLE: Unfortunately, that's the case.

THE COURT: Okay.

MS. NEVILLE: The second thing is that one cannot ask Mr. Miller a question now and get an answer that makes any sense.

THE COURT: Okay. Okay. I don't know that that's in dispute. I was just curious because of what you said. All right.

MS. NEVILLE: I'm even taking the fact that he must have received the money.

THE COURT: Okay.

MS. NEVILLE: Because there are a couple of instances where there was a check returned or a check

misplaced, and that shows up both in the Trustee's chart and in the Fiserv thing, but I think that's largely irrelevant.

THE COURT: Okay, thank you.

MS. NEVILLE: I think what's really important here is the fact that Fiserv held onto that money. And during the period, particularly from 2007 on, Fiserv was taking huge amounts of fees out. It took out a fee for the administration of the Austin Capital money as an extraordinary investment. That's what I think they called it, the extraordinary investment fee, which was taken out every month for monitoring the reports that were sent to retirement accounts from Citco regarding the Austin Capital account. So even that money went through -- went through Fiserv first.

I think the point that I was trying to make about the subsequent transferee and the timing here is that I don't -- I don't know if that was made a point in Nelson. I don't think it was, because I think I'm the one who spent most of her time tracing these ridiculous transfers from check to quarterly statement to client. But I do see that there was a period of time where Fiserv had the float on a good deal of money over a long period of time. And I think the case law in New York -- and again, it's another Bear Stearns versus Gredd case, but not the same one that I cited earlier, this is 397 B.R. 1 -- talks about the fact that

dominion and control doesn't mean you're free to buy uranium stocks and play the lottery. It's an exercise of any control. It's just not a mere pass-through of money from one entity to another.

And in this case, what we have is a huge entity holding on to lots and lots of money being transferred from BLMIS, Madoff Securities, Bernie Madoff, whoever, to these holders of these individual retirement accounts. They were able to take fees out of it, and did take fees out of it. They were indemnified, and had they actually been held liable for not adequately warning the customers of the fraud, they would have been indemnified and been able to take money again out of any accounts that remained.

That is enough to, I think, constitute dominion and control, and I think it turns Mr. Miller from being an initial transferee into being a subsequent transferee. And I think you got some of the subsequent transferee law from Mr. Cunha this morning, but there is more of it in our brief. Once you are a subsequent transferee, 550(b)(1) kicks in. It's very clear Mr. Miller had no knowledge of the fraud, and it's clear here that the value that was given was the value that is given to Fiserv. And they had a contract, so it fits within the Enron case for the question of meeting the value prong of 550(b)(1). There was value; there was no knowledge. There is a defense.

I would -- I think I've addressed the issue of interest. There was another aspect of the Nelson case. Judge Bernstein handed -- signed an order that said -- that relies on Wagner v. Eberhard, which is a Nevada case, and the Trustee has cited it again. But that is a case under Nevada law and turns on the fact that the trust, the IRA trust, is viewed as a separate entity. It's like a self-settled trust. But New York law blows that assumption away. So Eberhard and all the cases collected in there, which look at the difference between an individual retirement account and a self-settled trust, you know, are irrelevant. Wagner v. Eberhard is inapposite.

That's it, unless you have any more questions, and unless they have something I'd like to respond to.

THE COURT: I don't. I don't. Ms. Turner?

MS. TURNER: Thank you, Your Honor. Just a few points, and please bear with me as I kind of organize my thoughts here.

So, first, on Defendant's point regarding pre-judgement interest, because the Trustee has requested pre-judgement interest from the filing date through the date of entry of judgement. Defendant is correct that the Trustee asked for pre-judgement interest from the date of the complaint in Mann and Epstein. However, in both of those decisions, Your Honor cited -- and let me pull up the

case --

THE COURT: And you've taken me up on appeal on it, so...

MS. TURNER: Correct. Your Honor cited, I believe it's FKF 3, which held that Trustee is -- a SIPA Trustee is entitled to pre-judgement interest from the date of the filing date, and that is the basis for the Trustee's request in this case.

Second, regarding --

THE COURT: Just to be clear, that wasn't a SIPA Trustee. That was just a regular Chapter 11 Trustee, so...

MS. TURNER: Okay. Thank you, Your Honor, for the clarification. Sorry if I misunderstood.

THE COURT: No, you didn't. I'm just clarifying it for everybody's sake.

MS. TURNER: Regarding Defendant's argument about Mr. Miller's financial state, the Trustee is sympathetic to Mr. Miller's plight, but the Trustee has a fiduciary duty to recover the fictitious profits for the benefit of the Customer Property Fund, and Mr. Miller has held on to these profits for over 12 years.

And next, I just want to address, Defendant -- Counsel for Defendant spent a significant amount of time explaining why the New York law exemption applies. But the Trustee submits that the Defendant has failed to show that

this exemption operates to defeat the Trustee's avoidance claims. And I'm just going to run through some of Defendant's cited cases.

First, the Bear Stearns case; this involved fraudulent transfers of billions in short-ship sales, which are heavily regulated under federal law, that requires these assets to be frozen until the seller covers the short sale. In this case, there was no dispute that the transfers were short sales and could not have been used to satisfy other creditors. But here, in Miller, the Defendant argues that state law, not federal, would exempt his IRA assets. But the fictitious profits he received were comprised of customer property. Further, this no-harm-no-foul rule the Defendant suggests has been rejected in favor of finding that any exemption is the Debtors', here BLMIS, to assert.

And the other case Defendant relies on is Ehrlich v. Commercial Factors of Atlanta. In that case, CFA had a valid perfected security interest in the cash transferred to it in an effort to pay down the Debtor's debt. This wide-ranging security interest in its property and assets as collateral would encourage a CFA. HTG was transferring the property that was already secured by the transferee; thus, it never really belonged to the Debtor. Whereas here, the transfers to Defendant were always property of the Debtor, and anything beyond Defendant's deposits with BLMIS were

other customers' money and must be returned.

And then, I believe this is my last point, Your Honor. Counsel gave us a long history of the IRA custodian and made some general statements about delay that some of her other clients have experienced. But the Trustee would ask the Court to review his expert, Ms. Lisa Collura's Exhibit 11 to her expert report. It shows that almost all of the transfers were inflows to the custodian on the same day that they were outflows to the Defendant.

For example, I am looking at Exhibit 11 right now. On January 8, 2008, there was a transfer of $60,000 that was settled with the IRA custodian on January 8th. That same day, it was transferred to Defendant. Again, on February 19, 2008, another $60,000 was settled with the IRA custodian, and that same day, it was transferred to Defendant. Again, April 8, 2008, $100,000 was transferred to the IRA custodian and was settled that same day and sent to the Defendant. And most of these transfers occur -- most of the inflows and outflows occur on the same day, some one or two days apart.

And, I lied; I have one more point. With regards to Nelson, Counsel argued that this case differs factually. The Trustee submits it doesn't. There are no different facts here. But even if there were, Judge Bernstein held as a matter of law that the IRA custodian was a mere conduit,

so that doesn't matter in this case.

Your Honor, if you have any other questions, I'm happy to answer them. Otherwise, thank you for giving me the chance to argue. This was my first oral argument.

THE COURT: Ah, congratulations.

MS. TURNER: Thank you.

THE COURT: Welcome to the Court.

MS. NEVILLE: Your Honor?

THE COURT: Yes, ma'am, sure?

MS. NEVILLE: I'd like to answer some of the things Ms. Turner said. That first transfer in January of 2008 was requested from Bernie Madoff in -- December 24th of 2007, so there was a delay there in that particular one. The other transfers in 2008 were mostly anomalies, $300,000, which Mr. Miller requested for whatever reason he did.

And I am not saying that every single transfer throughout the entire 11 years that Mr. Miller had was delayed. But there are significant delays, and I have pointed them out in their brief. Virtually every single one in 2005 was delayed 10 days or a week. So there were certainly anomalies in the last couple of years. As I pointed out, 2006 had only one distribution; 2007 had that $1 million. There were definite anomalies, but throughout the entire time, retirement accounts had the ability to ask for the money, did ask for the money, took its fees out of

the money, and then transferred it to Mr. Miller.

So, there's no such thing as a matter of law that the custodian is a conduit. It's a factual matter. And what I'm arguing here is that there are facts that I have presented to you, which I don't think were presented in Nelson, that for 11 years, retirement accounts controlled this account and controlled the money -- controlled the ability to take the money out for its fees, and for whatever else it needed.

On the issue of fiduciary duty, I think I did address that there were exceptions made for other people in this particular instance where the Defendant showed that he had no money. And there were other exceptions, 386 to be exact. And I'd also like to point out that this may be the only case where SIPC actually went after innocent recipients of a fraudulent transfer. Virtually all the other cases prior to Madoff, it was only those who were complicit in the fraud or who profited from the fraud deliberately, not innocent customers. I mean, that's basically -- I understand fiduciary duty. At the moment, I believe that all of the people who lost principal are close to getting all of their principal back, both from the Madoff Trustee and from the Trustees --

THE COURT: That's irrelevant. That part's irrelevant.

MS. NEVILLE: Well, okay.

THE COURT: All right. Anyone else wish to add anything? You two will be receiving a written decision in this matter.

MS. NEVILLE: Thank you, Your Honor, and thank you for the break. I needed it. I needed an aspirin.

THE COURT: Thanks, everyone, and Ms. Turner, congratulations. It's always good to see the younger lawyers coming up to the Court.

MS. TURNER: Thank you, Your Honor.

THE COURT: And, as Ms. Neville and I know, we're probably the older lawyers.

MS. NEVILLE: A retiree, Your Honor.

THE COURT: Oh. Haven't made it there yet. On my way. Good luck, everyone. Thank you very much.

MAN 1: Thank you, Your Honor.

MAN 2: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 0:00 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

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